

Updates: Open Public Records Act (OPRA) N.J.S.A. 47:1A-1 et seq.



GLOUCESTER, SALEM, CUMBERLAND COUNTIES
MUNICIPAL JOINT INSURANCE FUND (TRICOJIF)
Annual Retreat: July 26th & 27th, 2018



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Review of the Open Public Records Act?

OPRA is a New Jersey statute that governs the public's access to government records in New Jersey. The law is compiled in the statutes 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; and
- ❖ Create an administrative appeals process if access is denied; and
- ❖ Define what records are and are not "government records".

What is the Definition of a “Government Record”?

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 an 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.



Robert A. Verry v. Franklin Fire District NO. 1, et. al., 230 N.J. 285 (2017)

On review by the Supreme Court from an Appellate Division decision ordering the release of the constitution and bylaws of a volunteer fire company that is a member of a fire district established pursuant to NJSA 40A:14-70. Plaintiff submitted a OPRA request seeking disclosure of the constitution and bylaws of the Millstone Valley Fire Department, a volunteer company operating within the District. The District denied the request on the basis that it does not maintain such documents for its member companies.

The Supreme Court held the volunteer fire company operating within the fire district was not a public agency subject to requirements of OPRA. However, the Court nevertheless found that the District was obligated and required to produce the volunteer company's constitution and bylaws because, due to the supervisory role the District exercised over the volunteer squad, the requested documents must either be on file with the District or subject to the District's demand for production.

What is not Subject to OPRA?:

- 1) You do not have to answer questions or do research.
- 2) Verbal communications.
- 3) Information that is not communicated within the context of emails regarding municipal business or if emails are to someone that is not business related about a social matter.
- 4) Records that have been destroyed with state approval.
- 5) You are not required to perform research and create new records.



Libertarians for Transparent Gov't v. William Patterson Univ.
(Unpub. App. Div. April 12, 2018)

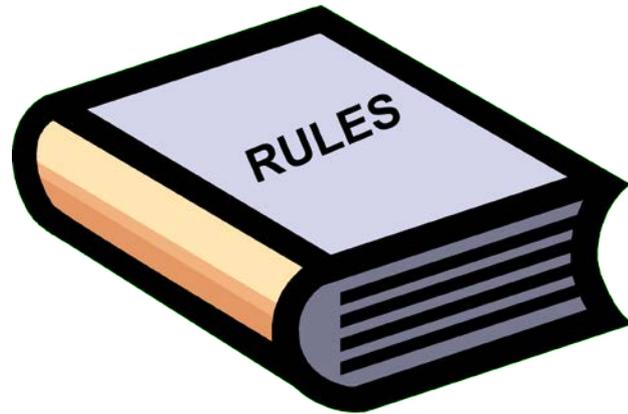
Under OPRA, a settlement agreement remains a draft document until it is signed. The Appellate Division therefore reversed the trial court's conclusion that William Patterson University violated OPRA by withholding a finalized, but unexecuted, settlement agreement. Plaintiff made an OPRA request for a draft settlement agreement, which was denied. After Plaintiff filed its complaint, the university produced the fully executed agreement. The Appellate Division held that it was in error for the trial court to have also required the University to produce a finalized, but unsigned draft of the agreement.

Libertarians for Transparent Gov't v. The College of New Jersey, (Unpub. App. April 12, 2018)

An individual named Guerrini and The College of New Jersey (TCNJ) settled a court case in principle, subject to the matter being reopened if they did not enter into a settlement agreement within sixty (60) days. Plaintiff then filed a request under OPRA for drafts of the settlement agreement and documents reflecting ongoing settlement negotiations in the Guerrini case. The request was denied and plaintiff filed an OTSC challenging the denial. While the OTSC was pending, Guerrini signed a release setting forth the terms of the settlement with TCNJ, which TCNJ then provided to Plaintiff. TCNJ's attorney asserted that at the time of plaintiff's request, the only potentially responsive document, an email from Guerrini's counsel to TCNJ attorney, reflected ongoing settlement discussion and thus was protected from disclosure. The attorney did not, however, submit an affidavit or other evidence to support his assertion. The Appellate Division held that the trial court erred in relying on TCNJ's unsworn response to Plaintiff's OPRA request in concluding the TCNJ did not violate OPRA. The Court remanded the matter to allow TCNJ to submit competent proofs as to the contact of the document or documents it withheld. Those proofs were ultimately submitted.

Exemptions:

There are 25 specific exemptions contained in OPRA. There are also exemptions contained in various Executive Orders. There may also be exemptions contained in State statutes, regulations, case law, etc. All of these exemptions can be accessed on the Government Records Council website (www.nj.gov/grc/custodians/exempt/).



N. Jersey Media Grp. v. Twp. of Lyndhurst, 2017 N.J. 745
(2017)

Here, the Supreme Court affirmed the Appellate Division decision that OPRA's criminal investigatory records exemption applies to police records that originate from a criminal investigation. However, the Court stated that "to qualify for the exception — and be exempt from disclosure — a record (1) must not be 'required by law to be made,' and (2) must 'pertain[] to a criminal investigation.' N.J.S.A. 47:1A-1.1." *Id.* at 3



Libertarians for Transparent Gov't v. Government Records Council, 453 N.J. Super 83 (App. Div. 2018)

The Plaintiff submitted a request to the Defendant for a copy of its February 23, 2016 public meeting minutes. In its response, the Defendant advised that the meeting was cancelled for lack of a quorum, and therefore, the council had not reviewed and voted on the minutes, and they remained in a draft form. Relying on NJSA 47:1A-1.1, the Defendant stated that the minutes should be considered records in draft form, and they should be exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative material. The Defendant further advised that once the minutes are approved they become governmental records and must be disclosed, however, while they are still in draft form, they are considered exempt from public access.

The Appellate Division ruled in favor of the Defendant, finding that draft minutes are exempt from public access under the deliberative process privilege under OPRA. For records to be exempt under the deliberative process privilege, the following two prong test must be satisfied: (1) the document is pre-decisional, meaning it was generated before the adoption of an agency's policy or decision, and (2) it was deliberative, in that it contains opinions, recommendations, or advice about agency policies.



Jeremy Mawhinney v. Township of Galloway Police Department

GRC Complaint No.: 2016-153

Decision: February 27, 2018

The Complainant submitted two (2) OPRA requests for the “charges/ticket/summons for theft of gas 7/31/2006 Case #2006-22609,” and “all juvenile records of the Complainant from 1987-2005.” The Custodian denied both OPRA requests. The first request was denied because the request sought records pertaining to a past criminal offense which had been expunged. The second request was denied because it sought his own juvenile records.

The GRC found that the Custodian did not unlawfully deny access on either request because OPRA does not abrogate exemption on public access pursuant to other statutes. The law on expungements, 2C:52-15, directs that for expunged records, “[i]n response to requests for information or records of the person who was arrested or convicted, all noticed officers, departments and agencies shall reply [...] that there is no record information.” Additionally, pursuant to NJSA 2A:4A-60(a), public access to “[s]ocial, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies” involving juveniles is substantially restricted. Neither OPRA nor NJSA 2A:4A-60 et. seq. provide an exception for an individual to access his own juvenile records outside of a court proceeding.

Who is the “Custodian of a Government Record”?

OPRA provides that the custodian of government records in a municipality is the Municipal Clerk. OPRA does not preclude a municipality from developing reasonable and practical measures for responding to OPRA requests which may include designating deputy custodians for particular types of records.

Whomever is designated as the “Custodian” should familiarize themselves with the Government Records Council (GRC) website (www.nj.gov/grc/custodians/). As the “custodian”, it is the Municipal Clerk’s responsibility to obtain and organize any and all documents that are responsive to an OPRA request.



OPRA Requests Seeking Claims Information

- Municipal Clerks that receive an OPRA request seeking documents pertaining to an ongoing or closed lawsuit or requesting other claims information, should forward that request to Kris Kristie in the JIF Executive Director's Office ONLY.
 - The Executive Director is designated by resolution of the JIF as the Custodian of Records for the JIF.
 - If you receive an “out of office” notification from Kris Kristie, please forward your request to Paul Forlenza.
- The Executive Director's office will confirm receipt of the request to the Municipal Clerk.

OPRA Requests Seeking Claims Information CONT.

- The Executive Director's office will then secure the information from Qual-Lynx and forward same to the Municipal Clerk. The Fund Solicitor will have reviewed these documents and determined whether they can be released.
- The Municipal Clerk will then respond with the documents that are responsive to the Request to the original OPRA requester.
 - The Executive Director's office will not respond directly to an OPRA requester for a request that was received by the Municipal Clerk.
- Municipal Clerks that receive an OPRA request pertaining to documents which are in the possession of the JIF, should send that request to the Executive Director's office ONLY.
 - Do NOT send the request to the Fund Solicitor or Qual-Lynx directly as the forwarding of the request creates confusion as to the status of the request.

OPRA Requests Seeking Claims Information CONT.

- The Executive Director's office recognizes the time constraints built into the OPRA statute and will respond to the Municipal Clerk as quickly as possible.
 - Do NOT wait to forward the OPRA request to the Executive Director's office. Please forward the request immediately upon receipt.
- Be aware of OPRA requests which seek information from multiple sources.
 - The Executive Director's office will only respond to those parts of the OPRA request that pertain to information held by the JIF.
 - The Municipal Clerk must obtain all other documents from all other sources, and the Municipal Solicitor should review those documents prior to their release.

Special Service Charge:

If the records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted in accordance with N.J.S.A. 47:1A-5.c.

There is a 14-point analysis to determine whether a special service charge is appropriate:

(www.nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf).



How Much Time do you have to Respond to an OPRA Request?:

Custodians should respond to an OPRA 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.

Day One (1) is the day following the Custodian's receipt of the request.

The Custodian's response must provide one of the following:

- ❖ Grant access to the records sought; or
- ❖ Deny access to the records sought; or
- ❖ Request clarification of the request; or
- ❖ Request an extension of time to fulfill the request.



Valentin v. Borough of Penns Grove, (Unpub. App. Div. May 2, 2018)

In this matter, the Appellate Division affirmed an award of sanctions against the Plaintiff under R. 1:4-8. When the Plaintiff submitted an OPRA request, the municipal clerk made a timely response via telephone and email advising that the records were too voluminous to be emailed and were available for pick-up instead. The Plaintiff did not respond to the phone call or email, but instead filed an OTSC alleging that the municipality failed to respond to his OPRA request. Municipal counsel sent the requisite notice asserting frivolity to Plaintiff's counsel, which notice again advised that the documents were available for pick-up. The Plaintiff picked up the documents but then refused to withdraw the complaint, asserting that the documents did not satisfy his OPRA request. Plaintiff's counsel then failed to appear at the OTSC hearing. Sanctions were imposed by the Court. Even though the appeal from the sanctions was untimely, the Appellate Division exercised its discretion to review the order and found the Sanctions to be appropriate.



Redacting Government Records:

Under OPRA, a government record that is otherwise publicly accessible may contain information which should not be disclosed and thus redacted.

Redaction means editing a record to prevent public viewing of material that should not be disclosed.

Personal identifiers such as, home address, telephone numbers, social security numbers, date of birth, etc., are examples of information to be redacted.

When redactions are made, the custodian must explain the reason for the redaction and the custodian has the responsibility to provide a reasonable explanation.



Must the Requestor be a Resident of the State of New Jersey?

NO!

Scheeler v. ACMJIF, 448 N.J. Super. 333 (App. Div. 2017)

The Appellate Division held that the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to 13, does not permit government agencies to deny access to a person who is not a resident or domiciliary of New Jersey. The court concluded that the term “citizen” was not intended to be a restrictive term, which is consistent with the purpose of OPRA in fostering broad access to public records.

Are There Records that are Subject to Immediate Release?

OPRA requires that custodians must ordinarily grant immediate access to budgets, bills, vouchers, contracts and public employee salary and overtime information.

❖ “Immediate access” means, at once, without delay.

Exceptions may include instances in which the requested records are in use, in storage or require medium conversion.

If a custodian cannot provide immediate access to records for a legitimate reason, the custodian must immediately provide such reason in writing to the requestor and notify the requestor of the anticipated deadline date upon which the records will be provided.



Nicholas Curcio v. Wall Township Police Department
GRC Complaint No.: 2018-98



The Custodian received Complainant's OPRA request for copies of email correspondences on May 2, 2018. On May 11, 2018, the 7th business day following receipt of the request, the Custodian responded to the request by seeking clarification. On May 14, 2018, the Custodian received clarification of the request. The Complainant filed his verified Complaint on May 23, 2018, 7 business days from the date Custodian received the Clarification.

The Complaint was dismissed as materially defective as an unripe cause of action. The Council found that records requested were not "immediate access records," and that the Custodian had seven (7) days from the date of receipt of the clarification to respond to the OPRA request. The Complainant verified his complaint before the statutory time period provided for the Custodian to respond had expired.

When Responding to an OPRA Request:

Initially, you must ask the following questions:



- 1) What is the person specifically requesting?
 - 2) Does the record exist?
 - 3) Can we identify the record?
 - 4) Can the record be retrieved without compiling new information or re-creating a document?
 - 5) When it is turned over, do any portions of the document need to be redacted?
- ❖ Do not try to interpret the request. Read it in literal terms.
 - ❖ Do not send emails, memos or written communications regarding municipal business with the expectation that it will remain private.
 - ❖ Maintain a log of OPRA requests and responses.

Steven Wronko v. Township of Jackson, et. al., 2017 WL 6398783
(App. Div. Dec 12, 2017)

Plaintiff requested “copies of all attorney invoices for Jackson Township from January 1, 2015 through December 31, 2015,” and, “copies of all litigation settlement agreements from January 1, 2010 through December 19, 2015 for Holmdel Township.” Jackson Township denied Plaintiff’s OPRA request as overly broad because Plaintiff did not identify a specific case or matter. The trial judge agreed with Jackson Township and dismissed the complaint.

The Appellate Division reversed the decision of the trial court, concluding that the request for the specific documents was limited to particularized identifiable government records rather than information generally. The Court found that the request was sufficiently clear and not overly broad, thus, the request complied with OPRA and Jackson Township was required to produce responsive documents accordingly.



Maintaining Records and E-Mails:

A Records Retention Schedule managed by the Bureau of Records Management lists the minimum legal time periods by which state and local government units must maintain all public records. Guidelines are available to the public on the Bureau of Records Management website.

Generally, emails must be maintained for a period of three (3) years.

Do not delete any emails or other public records without first consulting legal counsel.

To delete such information, you must receive approval from the Division of Archives and Records Management (DARM).



Paff v. Galloway Twp., 229 N.J. 340 (2017):

Here, the Supreme Court determined that an agency's electronically stored information is a "government record" under OPRA, unless otherwise exempt. The Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court had reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. The Court reasoned that:

Paff v. Galloway Twp., 229 N.J. 340 (2017): continued:

A document is nothing more than a compilation of information – discrete facts and data. By OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

. . . .

With respect to electronically stored information by a municipality or other public entity, the Court rejected the Appellate Division's statement that “OPRA only allows requests for records, not requests for information.” [Paff, 444 N.J. Super. 495, 503 (App. Div. 2016) (quoting [Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.