

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 27th & 28th, 2022

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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 follow the recommended procedures set forth in the OPRA Policy regarding Requests for Inspection and Copying of Documents which was adopted by the TRICOJIF on November 22, 2021.

TRICOJIF OPRA Policy

A copy of the Policy which was adopted on November 22, 2021 by the TRICOJIF is included in your Retreat Binder.



- Upon receipt of an OPRA Request seeking documents related to the Fund, whether administrative or claim/litigation related, the request should be immediately and carefully reviewed by the Member Municipality.
- The Member Municipality should immediately determine which documents are in their possession. Any documents in the possession of the Member that are identified to be responsive to the OPRA Request should be reviewed by the Municipal Solicitor prior to their release.
- All Complaints that are filed against a Member should be in the possession of the Municipal Clerk.
- All Settlement Agreements and Releases should be in the possession of the Municipal Clerk.

TRICOJIF OPRA Policy cont.

- An Administrative procedure was established by the Fund Administrator and the Fund Solicitor whereby, the Qual-Lynx General Liability Supervisor, will forward to the Member, at the conclusion of each case, copies of the following documents:
Complaint, Settlement Agreement/Release, Stipulation of Dismissal & Proof of any settlement payment.
- Upon the receipt of this information from Qual-Lynx, the Member should maintain the documents in the case file (either paper or electronic).
- If there are any documents that are responsive to the OPRA request that are determined not to be in the possession of the Member, and it is believed that the documents are in the possession of the Fund, then the OPRA request should be immediately forwarded to the Fund Administrator with a request for the specific documents that are not in the Member's possession.

TRICOJIF OPRA Policy cont.

- The appropriate Fund Professional shall then attempt to retrieve the documents that are responsive to the request from their records and/or the records of other Fund Professionals. Once the appropriate Fund Professional retrieves responsive documents, the documents will be provided to the Fund Solicitor for review and approval as to the release of the documents.
- All documents that are approved for Release by the Fund Solicitor shall be forwarded by the Fund Professional to the Member.



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.



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.



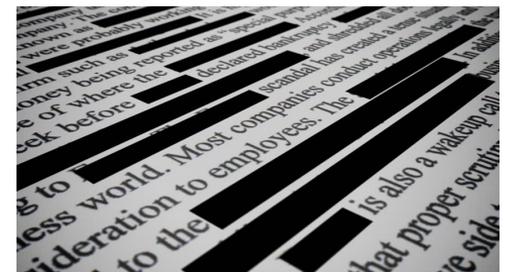
Redacting Government Records:

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.



Requests for Communications

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them:

- In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007).
- The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Edu. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).
- The GRC notes that the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. See Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).
- The Council has also found that an OPRA request not containing a sender and/or recipient is invalid. See Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018).

Body Worn Cameras (BWC)

The New Jersey Legislature mandated universal Body Worn Camera (BWC) implementation with the passage of P.L. 2020, c. 128 and 129. These two laws require the use of BWC by all “uniformed patrol officers” in the course of their duties, and provide the basic framework for the operation of BWCs and the handling of BWC footage.

While many departments in New Jersey had already been deploying BWCs on a routine basis, these laws have ushered in a rapid expansion of BWC use across the State, both in who will be required to wear a BWC and under what circumstances.



Body Worn Cameras (BWC) cont.

The New Jersey Attorney General, on May 25, 2021 issued Attorney General Law Enforcement Directive No. 2021-5 which was a revised “Body Worn Camera Policy” that conforms with the new legislation and reflects the practical experiences gained through law enforcement use of BWCs since they were introduced in 2015. While the Policy establishes foundational statewide standards, it permits agencies to account for local community needs and interests and encourages them to develop and share best practices as they gain experience in using these devices. The Directive became effective on June 1, 2021.

Body Worn Cameras (BWC) cont.

In addition to expanding the categories of officers required to be equipped with BWCs, the Policy continues a number of provisions from prior Directive 2015-1 that have proven to be best practices, such as the broad requirement that BWCs be activated in almost all police-citizen encounters and supervisory review of BWC recordings to improve officer performance. The Policy includes a number of new rules, including a requirement that officers, whenever safe and feasible, notify citizens when they are being recorded by a BWC; deactivate a BWC upon the request of a crime victim; and refrain from recording to gather intelligence information based on First Amendment protected speech, associations or religion.

Finally, the Policy prohibited law enforcement officers from reviewing BWC recordings prior to preparing initial police reports in most cases; incorporated longer retention periods for BWC recordings; provided additional opportunities for the subjects of BWC recordings to review the evidence; and provided for disciplinary action against those who violate the Policy.

However, on June 24, 2021, the Legislature adopted NJ A5864, which permitted law enforcement officers to review BWC recordings prior to creating an initial report which overrode the AG Directive.

Retention of BWC Recordings:

A BWC Recording shall be retained by the law enforcement agency for not less than 180 days from the date it was recorded.

A BWC Recording shall automatically be retained for not less than three (3) years if it captures images involving an encounter about which a complaint has been registered by a subject of the BWC Recording.

A BWC Recording shall also be retained for not less than three (3) years if voluntarily requested by:

- a) A law enforcement officer who made the recording;
- b) A law enforcement officer who is a subject in the recording;
- c) An Immediate Supervisor of the law enforcement officer who made the recording;
- d) Any law enforcement officer, if the BWC recording is being retained solely and exclusively for police training purposes;
- e) Any member of the public who is a subject of a BWC recording;
- f) Any parent or guardian of a minor who is a subject of the BWC recording;
- g) A deceased subjects' next of kin or legally authorized designee.



Public Disclosure of BWC Recordings:

Any agency receiving a subpoena, court order, or request pursuant to the Open Public Records Act, or the common law right to know, for a BWC recording shall, within one business day of receipt of such subpoena, court order, or request, and before complying with it, provide notice to the County Prosecutor. Such notice shall state clearly the deadline by which a response must be made.



Authority of County Prosecutor to Impose Additional Requirements:

Nothing in the Policy shall be construed to in any way limit the authority of a County Prosecutor to issue directives or guidelines to the law enforcement agencies subject to his or her supervisory authority, setting forth additional procedural or substantive requirements or restrictions concerning BWCs and BWC recordings, provided that such directives or guidelines do not conflict with any explicit provision of the Policy.

For example, a County Prosecutor may specify additional circumstances when a municipal police department BWC must be activated; impose limits on the authority of a municipal police department to specify additional circumstances when a BWC must be activated; categorically prohibit the use of BWCs with enhanced audio/visual capabilities such as infrared night vision (cf. Section 7.6, which requires prosecutorial approval to use such features); and specify additional circumstances when a BWC recording will be "tagged," etc.

Violations:



If a law enforcement officer, employee, or agent fails to adhere to the recording or retention requirements contained in this Policy, intentionally interferes with a BWC's ability to accurately capture audio or video recordings, or violates any other provision of this policy, the officer, employee, or agent shall be subject to appropriate disciplinary action, in addition to any judicial consequences outlined in the law.

An Update regarding the Production of Internal Affairs Records After the Supreme Court's Decision in *Rivera v. Union County Prosecutor's Office*

The New Jersey Supreme Court recently decided the case *Rivera v. Union County Prosecutor's Office*, which dramatically alters the way in which Police Departments will have to respond to requests for IA reports. And, subsequently, the Appellate Division issued an opinion in *Salvero v. City of Elizabeth*, which seemingly applies the Rivera analysis to subpoenas for IA records. It is anticipated that police departments around the State may receive the same or similar requests for IA records.



Rivera Decision

Rivera involved a records request seeking the results of an internal affairs investigation into misconduct by a former police director of the Elizabeth Police Department, James Cosgrove. The plaintiff's request sought the records under both OPRA and the common law, which the Union County Prosecutor's Office ("UCPO") denied. The New Jersey Supreme Court considered how to balance the need for confidentiality in internal affairs investigations with the public's interest in transparency. Ultimately, the Court held that, while OPRA does not permit access to internal affairs reports, those records can and should be disclosed under the common law right of access – subject to appropriate redactions – when interests that favor disclosure outweigh concerns for confidentiality. The Court's holding required the internal affairs report to be disclosed under the common law after the trial court reviews it and redacts parts that raise legitimate confidentiality concerns.

Rivera Decision cont.



Practically speaking, this decision requires the trial judge to

- (1) Review the report
- (2) Complete the necessary balancing test, and
- (3) Enter an order of disclosure with any necessary redactions. The Court provided guidance on how to conduct the balancing test, which departments now will be required to undertake upon receiving similar requests.

Rivera Decision IA Reports vs. IA Files

However, in a footnote, the Court addressed an important distinction between IA reports and IA files which may prove critical for projecting the impact of the *Rivera* decision on future IA records requests.

Thus, it is IA reports, and not the entire IA files, which are subject to disclosure under the common law analysis.



Rivera Decision OPRA vs. Common Law

While the definition of what constitutes a public record under the common law is broader than OPRA, it is also more difficult to obtain a public record under the common law than it is pursuant to OPRA. Indeed, in order to obtain records under "this broader class of materials, [a] requestor must make a greater showing than OPRA requires. This entails the requestor showing that:

- (1) The person seeking access must establish an interest in the subject matter of the material'; and
- (2) The [person's] right to access must be balanced against the State's interest in preventing disclosure.

As a result, the requisite showing to obtain a public record under the common law requires a balancing of the State's interest in preventing disclosure (the need for confidentiality factors) against the public's level of interest (the importance of transparency factors).

Subpoenas

Salvero v. City of Elizabeth

After the Supreme Court issued *Rivera*, the Appellate Division decided *Salvero v. City of Elizabeth*, which seemingly applied *Rivera*'s common law disclosure analysis to determination of whether IA records should be released upon receipt of a subpoena. It should be noted that the records request at issue in *Salvero* was for the IA file, which is broader than the request for the IA report at issue in *Rivera*, as discussed above.



Salvero Decision

Salvero involves a lawsuit brought by Elizabeth Police Officer Barbara Salvero ("Plaintiff") against the City of Elizabeth and James Cosgrove, seeking damages for violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -50. As part of that lawsuit Plaintiff served the UCPO with a documents subpoena seeking documents relating to its IA investigation into Cosgrove.



The Appellate Division opinion, while short, cites heavily to *Rivera*, noting that it "considered the discoverability of the same documents as the motion judge reviewed in this case" but through the lens of OPRA and the common law disclosure analysis detailed herein. The *Salvero* court concluded that "under these circumstances, we conclude that before we consider this matter, the motion judge here, in the first instance, should reconsider his determination, this time with the benefit of the Court's directions in *Rivera*."

Thus, it appears that the *Salvero* decision applies the *Rivera* analysis to a subpoena for IA records, which is a broader request than the one for the IA report sought in *Rivera*.



Guidance

In light of the *Rivera* and *Salvero* decisions, IA reports and records are subject to disclosure under the common law and pursuant to subpoena when the balancing of factors in favor of confidentiality is outweighed by the factors in favor of transparency.

Managing these requests will be extremely difficult for many police departments, as there will need to be a common law analysis each time an IA records request comes in, which likely will need to be articulated in the response. Responses to these requests will require a records custodian to present more detailed objections in order to allow a reviewing court to conduct the interest balancing test. If a request is made only under OPRA, *Rivera* holds that the report need not be produced, as the OPRA exclusion still applies. However, there is little reason to think that records requestors will not see the *Rivera* decision and begin making requests for IA documents under the common law.

*Consult with your Municipal Attorney and/or Labor Counsel when determining how to respond to these requests.



GRC Decisions

Approximately 75% of the GRC Complaints are being filed by Rotimi Owoh, Esquire (o/b/o African American Data & Research Institute)

Included in the Retreat Binder, are the following GRC Decisions:

1.) *Owoh v. City of Atlantic City*
Complaint No. 2018-247
Final Decision - January 25, 2022

Issues:

Unlawful denial of access to Records, failure to submit a Statement of Information (SOI) to the GRC and Attorney's fees to the prevailing party.

2.) *Owoh v. Somerdale Police Department (Camden)*
Complaint No. 2019-33
Final Decision - March 29, 2022

Issues:

Special Service Charge (14-point special service analysis) and Prevailing Party Attorney's Fees.

3.) *Owoh v. Glassboro Department (Gloucester)*
Complaint No. 2020-157
Final Decision - April 26, 2022

Issues:

Special Service Charge, Knowing and Willful Denial and Prevailing Party Attorney's fees.

GRC Decisions cont.

4.) *McBride v. Washington Township (Gloucester)*

Complaint No. 2020-231

Final Decision - May 31, 2022

Issues:

Alleged Unlawful Denial of Access to BWC footage that was lawfully purged.

5.) *Owoh v. Clayton Police Department (Gloucester)*

Complaint No. 2020-137

Final Decision - May 31, 2022

Issues:

Unlawful Denial of Access Knowing and Willful Denial and Prevailing Party Attorney's Fees.

Recommendations for Dealing with Owah Requests (Consult with your Municipal Solicitor)

Helpful
Tips

1.) Settlement Agreements

Request No. 1: Copies of settlement agreements for discrimination and or harassment from 2014 to the present.

*police and other departments

Request No. 2: Copies of settlement agreements for use of excessive force and or brutality from 2014 to present.

*police department only

Recommendation:

Providing the requested settlement agreement will depend on the individual facts of the underlying settlement agreement. Settlement agreements to resolve lawsuits or monetary claims should be provided. Settlement agreements to resolve an internal dispute are no longer categorically exempt from disclosure under the personnel exception, and therefore, they may have to be produced subject to redactions if they state the reason for termination of employment. With respect to Request No. 2 only, the custodian should request clarification as to what constitutes "excessive force" and/or "brutality".

Owah Responses



2.) Cancelled Checks / Invoices

Request No. 1(a): Copies of the cancelled checks and invoices used to settle the matters in (Request No. 1) above. Copy of cancelled checks and invoices relating items 8, 9, and 10 above.

Request No. 2(b): Copies of the cancelled checks and invoices used to settle the matters in (Request No. 2) above.

Recommendation:

Seek clarification on what is being requested. Upon clarification, provide the requested checks for settlement agreements or where ordered by a court to issue payment for complaints related to misconduct, harassment, excessive use of force and or discrimination. If payment listings can be obtained from the JIF, they may be used to satisfy a request for cancelled checks/invoices, subject to redactions for routing information and account numbers.

Owah Responses

3.) Complaints / Summons

Request No. 3: Copies of summonses and complaints that were issued and/or prepared by your police department relating to drug possession and drug paraphernalia from 2019 to the present.

- a.) Marijuana;
- b.) Other drugs.



Recommendation:

Criminal summons and complaints should be provided, but must be reviewed for redactions. For example, the privacy exception would allow a department to redact an individual's driver's license number, social security number, and unlisted telephone number from the summons and criminal complaint. For traffic summonses, the privacy exception would allow the home address to be redacted to prevent unsolicited contact. Importantly, the New Jersey Supreme Court recently held that a department can no longer deny a request for complaints and summonses on the basis that it does not maintain the records in question. The Supreme Court clarified that a department must produce such records if department personnel created the information contained in the records and the department can gain access to the records. Further, concerns related to expunged records might require more detailed review.

Owah Responses



4.) Officer Use of Profanity

Request No. 4: Copy of emails and/or radio transmission or text or other electronic/digital or paper in which the “N-Word” was used by any officer, employee or staff of the police department and or any other department(s) within the municipality from 2014 to the present.

- a.) This request includes Facebook postings by police officers and other employees that were brought to the attention of the police department and or any other department(s) within the municipality.

Recommendation:

Ask for further clarification. Once this information is provided, the responsive correspondence will need to be reviewed for redactions under OPRA's exceptions. Upon completion of the Department's review, the records should be provided. Depending on a variety of factors a special service charge may be warranted.

(14 Point Special Service Analysis)

Owah Responses

A proper request under OPRA must identify with reasonable clarity those documents that are desired. The Government Records Council has established specific criteria to determine whether a request for government communications properly identifies with reasonable clarity specific government communications. The GRC determined that to be valid, the request must contain:

- (1) the content and/or subject;
- (2) the specific date or range of dates during which the email(s) were transmitted; and
- (3) the identity of the sender and/or the recipient thereof.



Recommendations cont.

5.) Limited Personnel Records

Request No. 4(a): We need to know the name, date of hire, date of separation and reason for separation of the individual(s) who used or posted "N-Word" and or "racial slur" or "derogatory slur" due to either gender, race and or sexual orientation.

*We need to analyze whether most of the public employees and staff who use the slurs retain their public employments AFTER and despite using the slurs.

Recommendation:

Ask for further clarification. While the name, date of hire, date of separation, and reason of separation are subject to production after being reviewed for redactions to prevent the release of any unauthorized personnel information, sub-request 4(a) is reliant on Request No. 4 to establish its scope. The Request does not actually request a specific document, and forces the custodian to conduct research. Furthermore, requests that seek the custodian to analyze the data (i.e. identify the officers who "used the 'N-Word'", and determine whether they were eventually discharged, and whether this was the reason for their discharge) can be denied as forcing the custodian to conduct research for the reasons stated in connection with Request No. 4.

Recommendations cont.

6.) Internal Affairs Records

Request No. 5: Copy of complaints relating to use of the "N-Word" or any other racial or derogatory slur within the police department or any other department from 2014 to the present.

- * Gender, race and or sexual orientation.
- * Note that this request includes allegations that were substantiated and or unsubstantiated.
- * We are not interested in the name(s) of witnesses and or accusers because we do not want to discourage them from coming forward.

Recommendation:

Request clarification as to what constitutes "any other racial slur" and a "derogatory slur." The request, as written, is vague in that it requires the custodian to interpret a document (complaint) and determine what constitutes any "other racial" slur and/or any other "derogatory slur." Request clarification as to what constitutes a "complaint." For example, this request does not make clear whether it seeks legal complaints filed against a department, or internal complaints relative to IA investigations within a department. In the event sufficient clarification is provided, and to the extent the request relates to legal complaints, those records should be provided. To the extent the request relates to IA records, the Custodian should perform a common law analysis to determine whether the records should be produced.

QUESTIONS / DISCUSSION

