

NEW JERSEY LAWYER

Volume 17, Number 19

The Lawyer's Source

May 12, 2008

\$5

OPRA truly an 'exemptional' law

The fundamental concept of open government in New Jersey is often at odds with our government's desire to keep information secret in order to preserve privacy, maintain security or for a host of other reasons. It is a universal belief that secrecy in government results in dishonesty and the only way to dispel that belief is to throw open the doors of government at every level and allow for transparency in the actions and conduct of our public servants.

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Welcome the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), which became effective July 8, 2002. OPRA's desired goal is greater transparency in New Jersey government, an ideal best exemplified by the language of its preamble:

The Legislature finds and declares it to be the public policy of this State that: Government records shall be readily accessible for inspection, copying or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations of the right of access accorded by [OPRA] as amended and supplemented, shall be construed in favor of the public's right to access. N.J.S.A. 47:1A-1.

New Jersey residents are able to access government records in three ways: (1) through a citizen's common law right of access; (2) through the discovery procedures adopted by the New Jersey Supreme Court; and (3) through OPRA. This article focuses on public access to records under OPRA.

Government record

The definition of a "government record" under OPRA is broad and all-encompassing. It includes:

[A] 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 in the course of his or its official business by an officer, commission, agency or authority of the State, or any political subdivision thereof, including subordinate boards, or that has been received in the course of his or its official business by any such officer, commission, agency or authority or the State of any political subdivision thereof, including subordinate boards thereof. N.J.S.A. 47:1A-1.

This definition covers virtually the entire gamut of mediums in which information is kept, maintained or stored by every public entity in New Jersey, at every level of state and local government.

Requests

All OPRA requests must "be in writing and hand-delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate custodian." The New Jersey Government Records Council (GRC), the state agency established under OPRA to hear cases involving public record disputes brought by citizens denied access to government records, has advised that OPRA requires requestor submissions to be submitted on the relevant public entity's OPRA request form. Government Records Council, Advisory Opinion No. 2006-01 (Feb. 17, 2006). Further, the GRC recently held that requests made to custodians by facsimile transmissions are not valid requests

under OPRA unless the public entity has specifically authorized requests by fax. *Paff v. City of East Orange*, GRC Complaint No. 2007-297 (March 2008). Upon receipt of a valid OPRA request, custodians have seven business days in which to provide a requestor with a response. Within this timeframe, custodians shall either (1) grant or deny access to a request for records; (2) seek an extension of time to respond to a request; or (3) seek further clarification of the request. *Vessio v. Township of Manchester*, GRC Complaint No. 2006-130 (February 2008).

To constitute a valid response, the custodian's reply must be in writing. A custodian's failure to reply in writing in one of the statutorily mandated ways within the seven business-day window constitutes a deemed denial and could potentially subject the custodian to a fine if it is determined by a court or GRC that the conduct was knowing, willful and unreasonable in the totality of the circumstances. Awaiting legal advice from the custodian's legal counsel is not a lawful reason to delay access to requested records. *Cottrell v. Borough of Glassboro*, GRC Complaint No. 2005-247 (April 2006). However, it is important to note that OPRA only requires a custodian to provide records in response to those requests that clearly identify records and not those that are complex, overly broad in nature or require research by the custodian or his/her staff. *New Jersey Builders Association v. N.J. Council on Affordable Housing*, 390 N.J. Super. 166 (App. Div. 2007); *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534 (App. Div. 2005). With these considerations in mind, the safest practice for custodians to follow is to respond to the requestor in writing, for one reason or another, within seven business days.

Exemptions

OPRA makes all government records available unless access is restricted by at least one of the law's many exemptions. So therein lies one of the major problems with OPRA — too many exemptions. In fact, it can be said OPRA truly is an "exemptional"



law. The actual number of exemptions contained within OPRA is not quantifiable with any degree of accuracy given that, in addition to those exemptions enumerated or referenced in the law, OPRA also exempts other matters falling under or within confidentiality provisions contained in federal orders, federal law and regulations, rules of court, executive orders issued by a governor and regulations promulgated thereunder, resolutions adopted by either house of the legislature and similar exemption provisions contained within other state statutes. N.J.S.A. 47:1A-5.

Here are some of the more frequently cited exemptions.

ACD exemption

One of the most frequently cited exemptions by custodians for withholding access to government records is based upon the statute's exclusion of "inter-agency or intra-agency advisory, consultative, or deliberative material" from OPRA's definition of government records. This exemption, known as the ACD exemption, "is rooted in the notion that the sovereign has an interest in protecting the integrity of deliberations." *In re Liquidation of Integrity Insurance Company* 165 N.J. 75 (2000). The ACD privilege is premised on the belief that the government has an obligation to protect from public disclosure records that contain opinions, recommendations and advice. *Rademacher v. Borough of Eatontown*, GRC Complaint No. 2004-18 (November 2005). The exemption is aimed at protecting the quality of government decisions by shielding the communications received by decision makers from public disclosure. *Gannett New Jersey Partners, LP v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005).

New Jersey courts and the GRC have discussed the concept of ACD in a number of

decisions. Our courts and the GRC have consistently held that custodians are not obligated to disclose materials they believe to be pre-decisional and deliberative in nature. *Kesner v. N.J. Department of Banking and Insurance*, GRC Complaint No. 2003-67 (February 2004) citing *Integrity*, 165 N.J. at 84. In every case where the custodian employs this exemption, the government agency bears the burden of establishing that the material requested is pre-decisional and deliberative in nature. *In the Matter of Readoption With Amendments of Death Penalty Regulations*, N.J.A.C.

10A:23, 367 N.J. Super. 61 (App. Div. 2004); *Bent v. Stafford Police Department*, 381 N.J. Super. 30 (App. Div. 2005) quoting *Gannett New Jersey Partners LP v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005). Purely factual material is not entitled to the ACD exemption. *Integrity*, 165 N.J. at 85. The ACD exemption has been successfully applied to draft minutes of the meetings of public entities. *Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006). Draft minutes from open or closed meeting sessions are ACD and are not accessible as government records unless and until they have been formally adopted by the public entity.

Attorney-client privilege exemption

The attorney-client privilege exemption is another area that tends to restrict documents from disclosure. The privilege is deeply engrained in New Jersey jurisprudence and serves as an additional basis to withhold disclosure of government records under OPRA. The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient in our legal system." *In the Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989).

OPRA protects communications between an attorney and his/her client in the course of their relationship which, if disclosed, could jeopardize the legal position of the client. However, the fact a requested document may contain attorney-client privileged material does not automatically exempt the document from disclosure. *Diaz v. City of Perth Amboy*, GRC Complaint No. 2007-53

(February 2008). To the extent a requested document contains factual information or information that clearly does not fall within the attorney-client privilege, the custodian should redact the exempt portion of the document and release the balance of the document to the requestor. On the other hand, where the privileged portions of the document are intertwined with the balance of the document, the custodian may lawfully refuse to allow access to the entire document. *Meakem v. Borough of Pompton Lakes*, GRC Complaint No. 2003-66 (March 2004). The GRC has held the attorney-client privilege does not permit a custodian from withholding attorney or consultant bills or invoices. Custodians may, however, redact such records to remove information protected by the attorney-client privilege. Accordingly, attorneys are advised to refrain from including privileged information in invoices to their public entity clients.

Legislative records exemption

OPRA provides that information received by a member of the legislature from a constituent, or information held by the legislator concerning a constituent, is not to be considered a "government record" and thus, there exists no legal obligation to disclose such information. Interestingly, however, if some other government agency or official, with the exception of the governor's office, is copied on the message, the copy is a "government record" and accessible to the public. See Exec. Order No. 26, Gov. James E. McGreevey §2 (Aug. 13, 2002). Various types of records in the governor's office that would not otherwise be exempt under OPRA, are considered privileged.

Criminal investigatory exemption

Criminal investigatory records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; *Daily Journal v. Police Dept. of the City of Vineland*, 351 N.J. Super. 110 (App. Div. 2002). A "criminal investigatory record" means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.

Victims records exemption

Victims' records are exempt from disclosure except that a victim of a crime is entitled to access his own records. In addition, record requests from convicts seeking information on their victims is exempt from disclosure as well.

Computer and building security exemption

Information of a technical nature regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security is exempt from disclosure. *Tombs v. Brick Township Municipal Utilities Authority*, GRC Complaint No. 2003-123 (February 2006). Likewise, emergency or security information or procedures for any building, facility or persons therein is also exempt from disclosure. *Cardillo v. City of Hoboken Zoning Office*, GRC Complaint No. 2005-158 (September 2006).

Personal identifying information exemption

A person's Social Security number, credit card number, unlisted telephone number and driver's license number are, for the most part, exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Executive Order No. 21 signed in 2002 by Gov. McGreevey.

Personnel and pension records exemption

Except for an employee's name, title, position, salary, payroll record, length of service, date of and reason for the separation and the amount of pension received, an employee's personnel and pension records are exempt from disclosure under OPRA. *Janice Jackson v. Kean University*, GRC Complaint No. 2002-98 (February 2004).

Higher education exemption

OPRA also contains a statutory exemption for certain higher education records. In particular, N.J.S.A. 47:1A-1.1 exempts higher education research records, questions or scores for exam for employment or academics, charitable contribution information, rare book collections gifted for limited access, admission applications and student records, grievances or disciplinary proceedings revealing a student's identification. The GRC has held that survey results conducted by unit of a statutory component of



Rutgers University are research records and therefore exempt from disclosure.

Rosenbaum v. Rutgers University, GRC Complaint 2002-91 (January 2004).

In addition to some of the oft-used exceptions described above, OPRA also exempts trade secrets and proprietary commercial or financial information, administrative or technical information regarding computer hardware, records containing information that would give an advantage to competitors or bidders, records containing communications between a public entity and its insurance carrier, records required to be kept confidential by court order and federal certificates of honorable discharge. In addition, OPRA exempts records related to biotechnology trade secrets, ongoing investigations by non-law enforcement agencies unless disclosure is inimical to the public interest and public defender records.

Practitioners should be mindful that the wide range of exemptions found in OPRA provide significant flexibility with regard to the production of a government record to a member of the public. To this end, rather than making all government records available to the public, the Appellate Division

has recognized that OPRA serves to "significantly reduce the universe of publicly accessible information." *Bergen County Improvement Authority v. North Jersey Media Group, Inc.*, 370 N.J. Super. 504 (App. Div. 2004). Thus, the ultimate purpose of OPRA, as declared by the legislature's findings, is at odds with the practical impact of law's many exemptions. Depending on the scope of a member of the public's requests, the availability of records under OPRA may, in reality, be quite limited. ☉

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