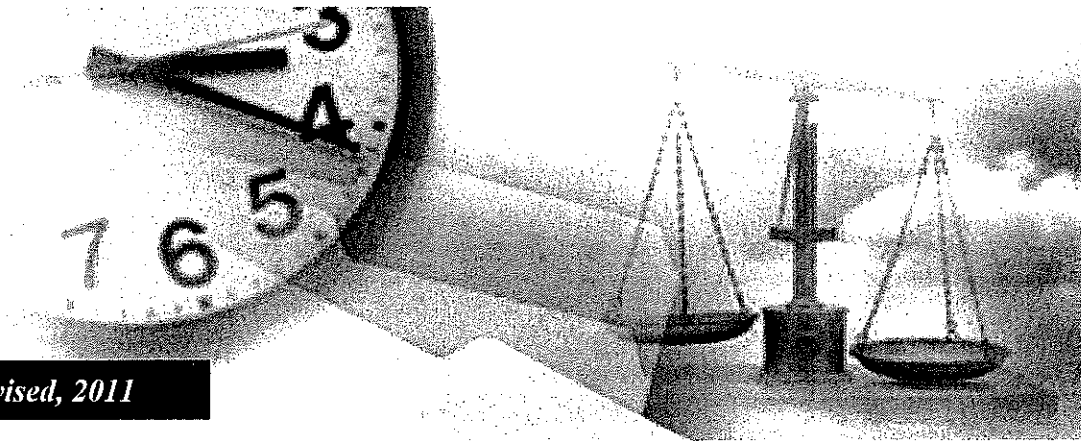




New Jersey State League
of Municipalities

Access To Public Records: A Primer



Revised, 2011

**Price: \$ 12.00 Members
\$ 14.00 Non-Members**

Published By:

New Jersey State League of Municipalities

222 West State Street

Trenton, New Jersey 08608

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Internet: www.NJSLOM.com



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New Jersey State League of Municipalities

INTRODUCTION

The League is pleased to publish this revision of the Guide to the Open Public Records Act.

On January 8, 2002, Acting Governor Donald DiFrancesco signed P.L. 2001, c.404, a sweeping revision to the public records law. This law, effective July 8, 2002, affects every aspect of local government and affects how every municipality in the State conducts its business.

While this publication is not a comprehensive examination of the Open Public Records Act law, it does provide an overview of the issue for municipal governments.

We hope you find this publication to be useful and informative.

Michael J. Darcy CAE
Executive Director

February 2011

The Open Public Records Act

By: Matthew Weng
Staff Attorney
New Jersey State League of Municipalities

A local elected or appointed official will frequently be required to understand and interpret the requirements of the Open Public Records Act (OPRA). While complicated and broad, this law can be easier to implement with a basic understanding of the statutory language that the court cases that interpret them.

I. Section 1: Legislative Findings

The OPRA statute is found at N.J.S.A. 47:1A-1 through 13. N.J.S.A. 47:1A-1 contains the legislative findings. It states:

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 on the right of access accorded by P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access ;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

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; and nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

This section contains several substantive points that are important for local elected officials to know. First, it is clear that the legislature intended OPRA to be as broad as possible. Indeed, all

government records are public unless exempted. Those exemptions can come from the following sources:

- statute
- a resolution from either or both houses of the legislature
- administrative regulations
- Executive Order of the Governor
- Rules of Court
- Federal laws, regulations, or orders.

It is important to remember that unless one of these sources contains an exemption for a document, it is a public record and should be released.

There is, however, another, often-overlooked exemption in the legislative findings. A public body has a responsibility to safeguard a citizen's personal information when disclosure of that information would violate that citizen's right to privacy. In Burnett v. County of Bergen, 198 N.J. 408, (2009), the New Jersey Supreme Court found that this was a substantive provision, and not just a toothless statement of policy. The Supreme Court developed a balancing that a public body should when they believe that a record may violate a citizen's privacy rights. In deciding whether to redact a record or deny access altogether, the public body should examine:

- the type of record requested
- the information it does or might contain
- the potential for harm in any subsequent nonconsensual disclosure
- the injury from disclosure to the relationship in which the record was generated
- the adequacy of safeguards to prevent unauthorized disclosure
- the degree of need for access
- whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

In one case examining this provision and its balancing test, the Courts have found that releasing records of employees who sought approval for employment outside a county prosecutor's office would violate those employee's reasonable expectations of privacy. In a separate case, a settlement of a sexual harassment suit was found to be a public record. The Court found the employee in question had filed a court case against the municipality, which is public information. Because of this, she did not have a reasonable expectation of privacy in the details of the settlement.

II. Section 2, Definitions and Exemptions

The next section, N.J.S.A. 47:1A-2 contains several important definitions as well as the statutory exceptions to OPRA.

A. Definitions

The two most important definitions to local elected officials are “government record” and “public agency.”

For the purposes of OPRA, “government record” means:

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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

Since only those materials deemed “government records” fall under OPRA, this definition is an important one. In fact, our Courts have found that “not every paper prepared by a public employee fits within the definition of a government record for purposes of the Open Public Records Act.” Bart v. City Of Paterson Housing Authority, 403 N.J.Super. 609, (App.Div. 2008). “If the public employee or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a government record subject to production under the Open Public Records Act (OPRA).” Michelson v. Wyatt, 379 N.J.Super. 611, (App.Div.2005). For example, handwritten notes taken at a meeting of a public body are not government records. In addition, documents regarding a criminal investigation which existed in the files of outside agencies were not required by law to be made, maintained, or kept on file by township custodian of records, and were therefore not covered by OPRA.

This definition also contains an important exception to OPRA. Materials that are consultative or deliberative are not government records. In order to fall under this exception, the document must satisfy two aspects:

- it cannot contain only facts; it must have recommendations, opinions, or advice;
- it must be generated before any decisions on its subject were made.

For example, in *Education Law Center v. New Jersey Dept. of Educ.*, 198 N.J. 274 (2009), a memorandum examining several alternative school funding formulas along with the pros and cons of each were found to exempt because they were deliberative.

Under OPRA, "Public agency" means "any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions."

This is another broad definition, intended to encompass municipalities as well as the boards that serve municipalities, such as a planning, zoning, or environmental board.

B. Exemptions

The exemptions found in Section 2 most commonly encountered by a local official are:

- criminal investigatory records;
- victims' records, except that a victim of a crime shall have access to the victim's own records;
- trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;
- any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;
- administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;
- 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;
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;
- information which, if disclosed, would give an advantage to competitors or bidders;
- information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position;
- information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;
- information which is to be kept confidential pursuant to court order;

- that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person; 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, or any private person or entity seeking to enforce payment of court-ordered child support; except 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); and 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.

III. Section 5: Inspection, copying, redaction

N.J.S.A. 47:1A-5 is the next section in OPRA that has particular importance for local officials.

This section requires towns to have available for inspection, examination, or copying, public records during normal business hours (unless the town has a population of 5,000 or less, in which case records must be available 3 days a week.) It also requires that the custodian of records, which for towns is the municipal clerk, to redact any confidential or exempted information before fulfilling the request.

If a requester asks for copies of the records, the municipality may charge them. Under this section of the statute, the permitted charge for copies is 5 cents for normal sized paper and 7 cents for legal sized paper. A municipality may charge more if they can demonstrate that their actual costs are higher than those listed here are. Keep in mind, however, that the cost of labor cannot be factored in; towns may only charge for supplies and material. A town may not charge for electronic copies, such as an emailed document, but if a requester would like something on a CD or a disk, they may charge only the actual cost of the CD or disk.

The next paragraph states whenever the nature, format, or volume of a request involves a record that cannot be produced on normal sized paper, or involves an extraordinary expenditure of time and effort, the municipality may charge a reasonable special service fee based on the actual cost to the municipality. It is important to note that a request that takes a little extra time and effort to fulfill will not qualify for a special service charge. The extra time and effort needed must be extraordinary. According to the Government Records Council, the “imposition of a special service charge is extremely subjective and the determination is made on a case-by-case basis. No special service charges can be established in advance by ordinance.”

Occasionally a person may make a request for a record in a specific medium. For example, someone might want a copy of the minutes of the latest meeting of the Council in digital format. If the town maintains the minutes only on paper, they have two choices. They can convert the record into the medium requested, or they can offer access in another medium that is meaningful to the person requesting the record. If the new medium is one not normally used by the town, or if conversion requires substantial manipulation and technical knowledge, the town may charge a special service fee. Again, the fee must be reasonable and based on the actual costs to the town.

“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.”

Towns are required to develop a form for OPRA requests (a sample is included in this handbook.) This form must include the following:

- specific directions and procedures for requesting a record
- a statement as to whether prepayment of fees or a deposit is required
- the time period within which the public agency is required...to make the record available (normally seven days)
- a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal
- space for the custodian to list reasons if a request is denied in whole or in part
- space for the requestor to sign and date the form
- space for the custodian to sign and date the form if the request is fulfilled or denied.

However, a custodian cannot deny a request because it is not on the official form, so long as the request has all the required information available. All requests must be in writing. OPRA does not permit a verbal request for documents.

Any request made must be made with specificity, and cannot require any research or ask any questions. A requester must, with a reasonable amount of precision, point to a certain document and request it. For example, a request for “any minutes of the planning board from last month” would likely be specific enough to require fulfillment. However, a request for “any document from the zoning board where restaurants are discussed” would likely not be specific enough. In this situation, the municipal clerk should contact the requester and ask for information that is more specific.

Unless a shorter period is required by statute, regulation, or executive order (for example, the requirement that immediate access be given to payroll and budget information), a public body normally has seven business days after receiving the request to fulfill the request. Any request that takes longer than seven business days to fulfill is a denial of access, with a few exceptions.

If the requester fills out their form without giving any contact information, the clerk is not required to respond to their request until that person appears before the clerk to reaffirm their request. If the record is in archived or in storage, and thus would take longer than seven business days to access, the clerk must advise the requester within seven business days, and to inform them of when they expect to fulfill the request.

“A custodian shall post prominently in public view in the part or parts of the office or offices of the custodian that are open to or frequented by the public a statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record by any person for inspection, examination, or copying or for purchase of copies thereof and the procedure by which an appeal may be filed.”

IV. Section 6: Challenging denials of access

A person who believes they have been denied access to a public record has two options to challenge that denial: they may sue in Superior Court, or they may file a complaint with the Government Records Council (GRC).

The GRC is the administrative body tasked with enforcing and interpreting the Open Public Records Law.

The public body has the burden to prove that the record is exempted from OPRA.

It is very important to note that OPRA allows a person who successfully challenges a denial of access in Superior Court to recover attorney's fees. To obtain attorney's fees, a plaintiff must show that there was a "causal nexus" between their lawsuit and the release of the records. In other words, they must show that they were only able to obtain these records because they filed the lawsuit.

TOWNSHIP OF ANYTOWN

MUNICIPAL BUILDING
1234 MAIN STREET
ANYTOWN, NEW JERSEY 00000

SAMPLE REQUEST FOR PUBLIC RECORDS

Name: _____ Address: _____

Telephone [Day] _____ Information on a Specific

Property Block _____ Lot _____

Information Requested:

- [] Municipal Lien Search ☐ Certificate
- [] Municipal Lien Search ☐ Information Only
- [] Municipal Improvement Search ☐ Certificate
- [] Municipal Improvement Search ☐ Information Only
- [] Municipal Tax Search ☐ Certificate
- [] Municipal Tax Search ☐ Information Only
- [] Property Assessment Information
- [] List of Property Owners within 200'
- [] License Information [Specify]

Fee: _____

Fee: _____

Fee: _____

Fee: _____

Fee: _____

Fee: _____

Fee: _____

Fee: _____

☐ Copy of Minutes [specify date] Township Council

_____ Planning
Board _____
Zoning Board _____

☐ Copy of Resolution [specify date & number] Township Council

_____ Planning
Board _____
Zoning Board _____

☐ Police Accident Report Fee: _____ Date & Names
_____ ☐ Other [specify]

The applicant acknowledges that in any case where items of public record regarding municipal liens or municipal improvement ordinances are provided and the applicant is not requesting certificates as provided in *N.J. S.A. 54:5-11*, et seq. or *N.J. S.A. 54:5-18.5*, neither the applicant nor any third party may assert any claim for damages against the Township of Anytown or its officers or

employees nor shall any act of the applicant constitute or be construed as creating an estoppel as to the Township's right to collect any outstanding balance or lien.

The information requested will be ready on _____

Estimated Number of Pages _____

Estimated Cost _____

Deposit [shall not be less than the estimated cost] _____

The public records requested will normally be available within four [4] business days, except that:

- 1 no tax or lien searches will be processed five [5] business days before and ten [10] business days after the quarterly due date for taxes [February 1, May 1, August 1, November 1];
- 2 no tax or lien searches will be processed two [2] business days before and after a tax sale;
- 3 fifteen [15] days for a certificate as to municipal taxes, liens or improvements;
- 4 minutes of public meetings will be available within two [2] business days after the minutes have been approved by the Council or Board;
- 5 records which are not readily available or which will require a search of records will be made available as soon as possible and the applicant will be provided with an interim report within five [5] business days indicating the amount of time which will be required to complete the search of the records.
- 6 Where a legal determination must be made as to whether records are "public records" the time to provide copies will run from the date that the municipal official receives the determination from the Township Attorney or a Court Order that the records should be provided.

The term "public records" generally includes those records which the Township is required by law to maintain. The term does not include employee personnel files, police investigation records, public assistance files or other matters in which there is a right of privacy or confidentiality.

**THE APPLICANT HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS FORM
WITH THE DATE ON WHICH THE INFORMATION IS EXPECTED TO BE AVAILABLE
AND THE ESTIMATED COST.**

**THIS COMPLETED FORM, WHEN SIGNED BY THE MUNICIPAL OFFICIAL SHALL CONSTITUTE
A RECEIPT FOR THE DEPOSIT MADE BY THE APPLICANT.**

Applicant Municipal Officer

Date: _____ Date: _____

TOWNSHIP OF ANYTOWN

Sample Resolution 1999-11

A RESOLUTION ADOPTING A PROCEDURE FOR MAKING PUBLIC THE MINUTES OF CLOSED SESSIONS.

BE IT RESOLVED by the Township Committee of AnyTown Township, in regular sessions this 1st day of January, 1999, as follows:

1 Township Committee Minutes review committee. There shall be a minutes review committee (MRC) consisting of the Administrator, the Township Attorney and the Township Clerk, whose job shall be to periodically review the minutes of closed sessions of the Township Committee and make recommendations to these bodies which minutes should be made public. The MRC shall have no power and shall not be a "public body" within the meaning of the Open Public Meetings Act.

2 Meetings of MRC. The MRC shall meet on an as-needed basis. Meetings of the MRC shall be as scheduled at the convenience of the MRC members by the Administrator.

3 Preparatory staff work. Prior to each meeting of the MRC, the Township Clerk shall prepare a list of all closed session minutes that have not been made public. The list and the minutes listed shall be made available to the MRC at their meetings.

☐ 4. Basis for recommendation. Recommendations to make minutes public shall be on a case-by-case basis, taking into consideration both the interest in maintaining confidentiality set forth in ☐ N.J.S.A. 10:4-12 and the interest in prompt disclosure set forth in N.J.S.A. 10:4-14. The applicable guidelines set forth in paragraph 7 of this resolution may be considered as a general standard. The Township Attorney may be consulted if legal advice is desired.

4 Decision. The decision to make public the minutes of any closed session shall be made only by the public body that authorized and convened that closed session, and shall be based on a finding that public disclosure of the matters discussed at such closed session will not be detrimental to the public interest. In making this finding, the public body shall take into consideration, but need not agree with, the recommendation of the MRC and the basis for the recommendation as set forth in paragraph 4 above. In cases where more than one matter was discussed in closed session, the public body may elect to make public only the minutes pertaining to certain of those matters, and to keep the rest of the minutes confidential. Should the minutes contain any material entitled to protection [such as, for example, personnel records, *see Hughes Exec. Order No. 9, 9/30/63, amended by Byrne Exec. Order No. 11, 11/15/74; Trenton Times Corp. v. BOE City of Trenton, 138 N.J. Super. 357 (App. Div. 1976)*], the public body shall excise such protected matter, provided, that all materials required to be contained in the minutes by N.J.S.A. 10:4-14 shall be set forth.

5 Once public, always public. Minutes which are made public shall not thereafter be treated as confidential, but may be seen and copied by any person in the same manner as minutes of open meetings.

☐ 7. Guidelines. The following general guidelines pertaining to the nine purposes for closed meetings set forth in N.J.S.A. 10:4-12.B. (*see appendix*) may be considered in recommending and deciding when to make public minutes of closed sessions:

☐ (a) Matters required by law to be confidential. When the need to preserve the secrecy of the

confidential information discussed no longer exists; provided, that material entitled to court protection shall not be disclosed.

☐ (b) Matters affecting the right to receive federal funds. When disclosure would no longer impair the right to receive funds or cause funds already received to be forfeited.

☐ (c) Matters involving individual privacy. Such matters shall not be disclosed except as ordered by a court of competent jurisdiction, or with the written consent of all of the individual(s) concerned. (See South Jersey Publishing Co., Inc. v. N.J. Expressway Auth., 124 N.J. 478 (1991).

☐ (d) Matters relating to collective bargaining agreements. When the collective bargaining agreement has been made and ratified.

☐ (e) Certain matters involving public funds. After the transaction involving the public funds has been made.

☐ (f) Matters affecting public safety and property. When disclosure would no longer impair the safety and property of the public or the conduct of any investigation.

☐ (g) Litigation, contract negotiation and certain privileged matters. As to litigation, when a final decision has been rendered and all rights of appeal are exhausted; as to anticipated litigation, when the statute of limitations has expired or a binding settlement precluding litigation has been made; as to contract negotiation, when either the contract has been made and is binding of all parties or if not made, when negotiation is terminated; as to matters falling within the attorney-client privilege, at such time, if ever, that disclosure would not violate the attorney's ethical duties.

☐ (h) Employment matters. When the employment decision has been made and all rights to litigate or appeal are exhausted; provided, that material entitled to court protection shall not be disclosed.

☐ (i) Deliberations after hearing in penalty matters. After the decision to impose or not impose the penalty has been made and all rights to litigate or appeal are exhausted; provided, that material entitled to court protection shall not be disclosed.

CERTIFICATION

The foregoing is certified to be a true copy of a resolution adopted by the Township Committee the Township of AnyTown on January 1, 1999

Inna Record, RMC Township
Clerk

**GOVERNMENT RECORDS COUNCIL
VOLUME 3, ISSUE 2 NOVEMBER 2010
CHARGES FOR COPIES OF GOVERNMENT RECORDS**

The Government Records Council (GRC) has published several issues of The OPRA Alert regarding the changes to OPRA's copying fees. In its most recent issue dated September 2010, the GRC informed the OPRA community that Governor Christie signed into law new fee legislation that will dramatically change the copy fees established under N.J.S.A. 47:1A-5.b. These changes to the copy fee schedule become effective for all New Jersey public agencies on Tuesday November 9, 2010.

Previously, the OPRA fee schedule set forth in N.J.S.A. 47:1A-5.b. provided that "the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page."

Said provision of OPRA has since been amended to provide that:

"[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. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. 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." (Emphasis added). N.J.S.A. 47:1A- 5.b.

To fully understand the impact of this amendment to OPRA's copy fee schedule, the GRC interprets each sentence of the amended fee provision below:

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."

This sentence means that custodians are to 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. “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.”

For records that do not have a specific fee established by statute (like the Treasury example above), 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. For example, a custodian providing access to 3 pages of printed meeting minutes on letter size pages would charge a requestor \$0.15 (\$0.05 per page for 3 pages = \$0.15).

3. “If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section.” (Emphasis added).

It is possible that the actual cost to produce paper copies will exceed \$0.05 per letter size page or smaller and \$0.07 per legal size page or larger for some public agencies. In these instances, the OPRA amendment allows custodians to charge the actual cost of duplication, which is limited to the cost of materials and supplies used to make the copy. The GRC has previously provided the OPRA community with an actual cost calculation which should be used to determine the actual cost of providing paper copies. See OPRA Alert Volume 2, Issue 3 (June 2010).

How to Calculate Actual Costs (only if copies exceed the \$0.05 and \$0.07 rates)

- Custodians should contact their supplier to determine the cost of paper and toner. A supplier is wherever the agency obtains those materials – paper and toner (i.e. central purchasing unit, Staples, Office Depot, etc).
- Calculate or contact copying company to determine the agency’s annual copying volume (calendar or fiscal year, however the agency operates). This does NOT only include copies pertaining to OPRA requests – this is ALL copying on all copy machines in the agency for all purposes.
- Contact copying company to determine the average paper life of one toner/ink cartridge (i.e. how many pieces of paper the ink or toner should be able to copy).

- Custodians must maintain documentation of all information provided by copying company or office supplier (i.e. contracts or correspondence from purchasing agent or copying company) regarding this calculation.
- Actual calculation is the total cost of paper purchased for 1 year (calendar or fiscal) + the total cost of toner purchased (calendar or fiscal) ÷ the annual copying volume.
- This calculation can be averaged for all copy machines in an agency that produce letter and legal copies. Special copiers, such as for color printing or blueprints copied in house, should be calculated separately.

4. "If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section." (Emphasis added).

The reference to "subsection c." pertains to OPRA's special service charge provision, which is applicable in instances when fulfilling an OPRA request requires an extraordinary amount of time and effort. For guidance on how and when to apply a special service charge to an OPRA request, please refer to the GRC's "Special Service Charge" handout online at <http://www.nj.gov/grc/meetings/present/>. The GRC strongly encourages every public agency to clearly identify its per page copy fee on its OPRA request form, whether it be the flat rates established in N.J.S.A. 47:1A-5.b., or the actual cost calculated by the agency.

5. "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."

Records provided via e-mail and facsimile are free of charge. Custodians must charge the actual cost to provide access to all other electronic materials such as CD-ROMs, DVDs, videotapes, audiotapes, etc. No specific calculation is required to determine the actual cost of these supplies. 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 \div 100 = \1.00).

Please note that neither OPRA nor the GRC administer the fee schedule for discovery requests. Thus, the GRC cannot provide any guidance as it relates to any fees associated with discovery requests. Requests for discovery are guided by the Rules of Court.

The Sunshine Law and OPRA E-Mailers Beware

By Stuart R. Keonig
League Senior Assistant Counsel
Stickel, Keonig & Sullivan

Are you doing all you can to comply with the Open Public Meetings Act and Open Public Records Act—particularly when you communicate on-line? Unfortunately, many public officials are not aware of the legal implications of the interaction between these two statutes and the rise in the use of electronic communications (e-mail; text messages; even “Facebook” or “Twitter”). The Open Public Meetings Act (OPMA) defines a meeting as: “...any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of the public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon specific business of that body.....” It is not necessary for the meeting to occur at a specific location (such as in the municipal building), nor that a quorum be physically present (the meeting can occur if “corporeal,” or by means of communication equipment).

When communication equipment is used by members of the governing body to discuss public business, questions can arise as to whether a public meeting is taking place. For example, suppose that the Township Administrator e-mails a copy of correspondence from a local citizen suggesting that the town should increase fees for mercantile licenses. Council Member #1 sends an e-mail to the other four Council Members stating that he thinks this is a great idea and the fee should be raised by \$20. After further e-mail exchanges, Council Members # 2 and 3 agree that the fee should be raised by this amount. Assuming three members constitutes a quorum of Council, a decision has tentatively been made regarding public business. It could be argued that this type of exchange is a “meeting”, and because no notice of same was ever given, it violates the OPMA.

The legislative underpinnings of OPMA set forth in N.J.S.A. 10:4-7 are instructive: The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way... The ease and convenience of e-mail and text messaging can, for all intents and purposes, lead to circumstances where a majority of the governing body is “meeting” and making decisions

outside of a regularly advertised meeting of that public body. "Send All" and "Reply to All" settings are particularly dangerous in this context.

Government officials should consider the Sunshine and OPRA laws before pushing "send." It is certainly appropriate, even vital, to an elected official's performance of his/her duties to stay informed regarding issues of the day. It is not the intent of this article to discourage the practice of a Township Manager, Clerk, or elected official, from sending, via e-mail or other means, copies of significant correspondence, documents or information regarding ongoing matters to elected officials on a timely basis between meetings. However, substantive discussions of the import of such information and action to be taken should not occur except in compliance with the OPMA.

New Jersey Courts are fairly emphatic when addressing the purpose of the OPMA. "The long-standing appreciation of the importance of open government stems, in part, from the understanding that openness reduces public corruption." *Taurus v. Pine Hill*, 189 N.J. 497, 508 (2007). Debate and formal action can only be taken during a properly noticed public meeting to avoid challenges to, and invalidation of, actions. In *Caldwell v. Lambrou*, the court voided a series of zoning variances because a portion of the final meeting during which they were debated was conducted in closed session. 161 N.J. Super. 2874, 291-92 (Law Div. 1978). In today's environment, with its pervasive suspicion of governmental actions, it is not difficult to envision a court voiding municipal action that was set in motion, and generally vetted, via private e-mails between the members of a governing body.

An equally important consideration is that e-mails and text messages discussing public business have been held to be written public records subject to the Open Public Records Act (OPRA.) Note that whether a document or message constitutes a government record does not depend on its source or storage location. Thus, an e-mail message from one Council Member to another Council Member using their private personal computers is, nevertheless, a public record if the topic of discussion is a matter of public business. (Note that the terms "government record" and "public record" are often used interchangeably.)

Although there are numerous caveats and exceptions to this premise with which officials should be familiar, the following is the core definition of a government record found at N.J.S.A. 47:1A-1.1:

'Government record' or 'record' means 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 in the course of his or its official business by any officer, commission, agency or authority of the State or any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official

business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof...

When the Custodian of Records receives an OPRA request, that individual has an affirmative obligation under the statute to seek out government records wherever they are located and regardless of who has possession of them.

In Opinion 2005-127, the Government Records Council (GRC) found that a Mayor's e-mail account was an accessible public record. Originally, the custodian claimed that the e-mails were not government records because they were not maintained in the custodian's files. The GRC concluded that the Mayor used his personal e-mail account to conduct municipal business, therefore making those e-mails government records under OPRA. A government record, therefore, is not defined by the source or location of its emanation (private e-mail account vs. public e-mail account). It is still recommended, though, that e-mails among public officials be conducted on e-mail accounts of the public entity and not private accounts. At least this way, if a separate e-mail account is set up for public business, there is less risk that private matters will inadvertently be made public.

The State Division of Archives and Records Management (DARM) has established guidelines and best practices for managing electronic mail. A copy of DARM's circular 03-20-ST is available on the division's website at: www.njarchives.org/links/electronic.html. DARM has established retention policies and timeframes for a vast number of public records. Local governments should manage their records in accord with these recommendations. Note, however, that it has been held that simply following the process and obtaining approval for record destruction, does not relieve the Records Custodian from producing the record in response to an OPRA request if the record has, in fact, not yet actually been destroyed. In this same vein, the deleting of an e-mail discussing public business by a government official can constitute a violation of state record retention requirements.

The bottom line is that while Internet communications and texting are very convenient, they also present legal issues which are often overlooked, but which have significant implications to public entities and public officials.

EXECUTIVE ORDER NO. 9 OF GOVERNOR HUGHES

When it first became effective, NJSA 47: 1A-1 et seq. bestowed an unlimited and unqualified access to government records. The first attempt to place uniform limits on access to government records was Governor Hughes Executive Order No. 9 of September 30, 1963. The purpose of EO No. 9 was spelled out in its preamble: *The public interest requires that the public records which are excluded from the application of Chapter 73 be excluded on a uniform and Statewide basis with full regard for the need to balance the right, in a democracy, of the public to know, against the risk of unintentional harm or injustice to individuals that might be occasioned by indiscriminate exposure of certain records containing data of a sensitive or personal nature without regard to the motivation or justification of those seeking to inspect or copy records.*

Section 3 of EO No. 9 was the first attempt to spell out the limits of the public's right to access to government records under NJSA 47: 1A-1 et seq. Except as amended by BO No. 11 of Governor Byrne and EO No. 123 of Governor Kean, the limitations specified in EO No. 9 of Governor Hughes are still in effect, and are listed below:

3. *The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of Chapter 73, P.L. 1963:*
- ☐ *(a) Questions on examinations required to be conducted by any State or local governmental agency;*
 - ☐ *(b) Personnel and pension records which are required to be made, maintained or kept by any State or local governmental agency;*
 - ☐ *(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 K.S. 53:1-20.] 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 OF GOVERNOR BYRNE

EO No. 11 of Governor Byrne, issued November 15, 1974 modified the list of government records not deemed to be public records by rescinding Section 3 (b) of Governor Hughes' EO No.9. A new policy concerning public access to the personnel and pension records of public officials and employees was spelled out in Section 2 of EO No. 11:

2. *Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, an instrumentality of government shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties, personnel or pension records of an individual,*

except that the following shall be public:

☐ a. *An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving;*

☐ b. *Data contained in information which disclose conformity with specific experimental [sic], educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released*

EXECUTIVE ORDER NO. 123 OF GOVERNOR KEAN

Over the years confusion arose in the media and among law enforcement personnel as to the accessibility of certain police records, whether they were public records under NJSA 47: 1a et seq. or whether they were exempt from public access under Section 3 (e) of Governor Hughes EO No. 9. To

clarify which police records were public records Governor Kean issued his EO No. 123 on November 12, 1985. In EO No. 123, Governor Kean modified Section 3 (e) of Governor Hughes EO No. 9 as follows:

2. *The following records shall not be deemed to be public records subject to inspection and*

examination and available for copying pursuant to the provisions of Chapter 73, PL 1963:

- ☐ (a) *Fingerprint cards, plates and photographs and similar criminal investigation records which are required to be made, maintained or kept by any State or local government agency, except that the following information shall be made available to the public as soon as practicable unless it shall appear that the release of such information will jeopardize the safety of any person or any investigation in progress or be otherwise inappropriate. For the purposes of this Order, the term "as soon as practicable" shall generally be understood to mean within 24 hours.*
- ☐ (i) *Where a crime has been reported but no arrest yet made information as to the type of crime, time, location and type of weapon if any.*
- ☐ (ii) *If an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victim of injury and/or death to any such victim or where the release of the name of any victim would be contrary to existing law or court rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim 'is family, and the*
integrity of any ongoing investigation, shall be considered These concerns are heightened when a crime has been reported but no arrest yet made.
- ☐ (iii) *If an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information, and the identity of the complaining party unless the release of such information is contrary to existing law or court rule.*
- ☐ (iv) *Information as to the text of any charges, such as the complaint, information and indictment unless sealed by the court.*
- ☐ (v) *Information as to the identity of the investigating and arresting personnel and agency and the length of the investigation.*
- ☐ (vi) *Information on the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police.*
- ☐ (vii) *Information as to circumstances surrounding bail, whether it was posted and amounts thereof*
- ☐ (b) *The Attorney General, as chief law enforcement officer of the State, or his designee, or, where appropriate, the County Prosecutor, as chief law enforcement officer of the county, shall promptly resolve all disputes as to whether or not the release of records would be "otherwise inappropriate," between the custodian of any records referred to herein and any person seeking access thereto. Where the Attorney General or the County Prosecutor determines that the release of records would be "otherwise inappropriate," he shall issue a brief statement explaining his decision.*

**EXCERPTS FROM NEW JERSEY PRACTICE
LOCAL GOVERNMENT LAW
SECOND EDITION**

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§ 12:4. Right to Know Law—Exceptions

The 2001 amendments include a number of substantial changes and clarifications as to the exceptions to the Law. A series of last minute amendments provide that virtually all communication between constituents and members of the Legislature are to deemed confidential. Autopsy photos and other medical evidence, with certain exceptions by court order, or for criminal investigation purposes.

- information regarding criminal investigatory records;[FN0.50]
- victims records;
- trade secrets;
- attorney-client privilege documents, but not consultant bills or invoices, except that same may be redacted as to confidential information;
- proprietary information as to computers;
- any information that the disclosure of which would result in loss of security or jeopardize property or persons therein;
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;
- information which, if disclosed, would give an advantage to competitors or bidders;
- information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position;
- information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;
- information which is to be kept confidential pursuant to court order;
- individual social security numbers, credit cards numbers, unlisted phone numbers or driver license numbers, except under certain circumstances;
- a number of records kept by institutions of higher education; and

- the act is fairly specific as to the types of information as to crimes which may be released and when it may be released.

In addition to the foregoing, the 2001 amendments retain all those exemptions previously provided by the following sources.[FN1]

The provisions of this act, 2001 N.J. Laws ch. 404 (C. 47:1A-1 et al.) (now pending before the Legislature as this bill) shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c.73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of Legislature; regulation promulgated under the authority of any statute of Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal government; or federal order.

The provisions of this act, P.L. 2001, c.404 (C. 47:1A-1 et al.) (now pending before the Legislature as this bill) shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

In order for a government entity to be entitled to avail itself of the Open Public Records Act's deliberative material exemption, the document must also be deliberative in nature, containing opinions, recommendations, or advice about agency policies; the privilege does not extend to purely factual material that does not reflect deliberative processes.[FN1.50]

Tapes of 911 calls are considered government records under the Open Public Records Act ("OPRA") and therefore must be released to the public upon proper request.[FN2]

However, a tape and copy of redacted transcript of a 911 call were found to be exempt from disclosure under the privacy provision of the Open Public Records Act.[FN3]

In the absence of a factual showing that any of the use of force reports sought by resident under the Open Public Records Act pertained to an actual criminal investigation or to an existing related civil enforcement proceeding, the reports could not generically be regarded as criminal investigatory reports that were to be shielded from public access.[FN3.30] The possible, speculative use of a use of force report in an internal affairs investigation did not provide the necessary basis for precluding access to report under Open Public Records Act.[FN3.70]

In *Gannett N.J. Partners v. Middlesex*,[FN4] the Appellate Division considered numerous requests from a news cover agency. Generally, the Court found that to qualify for the deliberative process privilege, which exempts communications to government decision makers from public disclosure under the Open Public Records Act, two conditions must be satisfied: (1)

the documents must be pre-decisional, meaning it was generated before the adoption of an agency's policy or decision, and (2) it must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. The deliberative process privilege, which exempts communications to government decision makers from public disclosure under the Open Public Records Act, does not extend to purely factual material that does not reflect deliberative processes; therefore, if a document contains both deliberative and factual materials, the deliberative materials must be redacted and the factual materials disclosed.

As to the specific requests, the Court found:

1. The news organization was entitled to disclosure of notes of principal planner in county planning department pursuant to its request under the Open Public Records Act, provided that all deliberative matter was redacted from the notes leaving only factual material prior to disclosure.
2. The news organization was not entitled to disclosure of telephone billing records of county officials under the Open Public Records Act; judicial case law held that public officials and the persons they talk to have right to confidentiality, there was no practical way to prevent disclosure of any unlisted numbers that had been called and voluminous request for 12 months worth of records would disrupt agency operations.
3. The news organization was not entitled to disclosure of county counsel's appointment book or Freeholder Director's computer index of addresses and telephone number pursuant to Open Public Records Act, given that public officials had right of confidentiality regarding who they have spoken with.
4. The news organization was not entitled under Open Public Records Act, to disclose of county counsel's notes and his secretary's responses regarding city condemnation litigation, as protected attorney work product, even though county was not a party to the litigation and county agreed to fund a substantial portion of the cost of acquisition of the property.
5. However, the County's voluntary disclosure under the Open Public Records Act of documents that were the subject of federal grand jury subpoena, and disclosure of index of documents withheld from disclosure on grounds of confidentiality, waived county's right to challenge disclosure based on improper request; media did not specify the documents it sought, but merely requested all documents provided in response to the subpoena.[FN5]

In *Asbury Park Press v. Monmouth*, [FN5.30] Appellate Division found that the County's agreement with its employee, settling employee's sexual harassment lawsuit, did not settle a complaint filed with a public employer, and was not a "grievance," and thus was not excluded from disclosure requirements of Open Public Records Act, under exclusion for information

generated in connection with sexual harassment complaints filed with public employers, since employee's lawsuit was filed in superior court, not with the county.

However, in *North Jersey Media Group v. BCPO*,^[FN5.70] the Appellate Division determined that the Privacy interest of prosecutor's office employees outweighed public interest in disclosure such that newspaper which brought public records request was not entitled to inspect records of employees who sought approval for employment outside the prosecutor's office; records could not be meaningfully redacted in a manner protective of the employees' legitimate privacy interests, and dangers inherent in disclosure, including safety and security of office employees, precluded disclosure. N.J.S.A. 47:1A-1, 47:1A-10.

Information including the names of every person receiving city health benefits, the justification or reason for that person's benefits, the type of that person's coverage, the names of that person's dependents, and that person's claim history was not subject to disclosure by city pursuant to the Open Public Records Act. The city participated in state health benefits plan which was administered by State Health Benefit Commission, which was a covered entity under the Health Insurance Portability and Accountability Act rule regarding privacy, legislature had expressly barred access to such detailed information sought by plaintiff, governor had promulgated an executive order declaring such information confidential, and Commission regulation barred access to such information.^[FN6]

In one recent cast, a law enforcement series application, which is both an examination application and employment application for police officers, is not a government record subject to disclosure under the Open Public Records Act, however, the information contained in the examination regarding the officer's education was subject to public access under OPRA, and thus, newspaper was entitled to a redacted copy of the application for the purposes of determining if police officer was hired without having the required minimum education qualifications.^[FN7]

In *ELC v. Doe*,^[FN8] the Supreme Court held that once the threshold requirements for application of the deliberative process privilege under Open Public Records Act have been proved by the government, the privilege is invoked, resulting in a presumption of confidentiality because the government's interest in candor is the preponderating policy and the balance is said to have been struck in favor of non-disclosure. In this case, a memorandum prepared by state Department of Education, consisting of statistical projections derived from alternative school funding formulas, was entitled to protection under deliberative-process privilege and, therefore, was exempt from release under Open Public Records Act, though hypothetical funding considerations used in memorandum involved computer generation of numbers and figures from neutral, or raw, factual information; document was created during, and used as part of, the deliberative process, and it was capable of reflecting what people were thinking and considering during the process of deliberating.

[FN0] Of The New Jersey Bar.

[FN0.50] See *Spinks v. Township of Clinton*, 402 N.J. Super. 465, 955 A.2d 304 (App. Div. 2008), certification denied, 197 N.J. 476, 963 A.2d 845 (2009).

[FN1] 2001 N.J. Laws ch. 404, § 10.

[FN1.50] N.J.S.A. 47:1A-1.1. *Education Law Center ex rel. Burke v. New Jersey Dept. of Educ.*, 396 N.J. Super. 634, 935 A.2d 858, 226 Ed. Law Rep. 965 (App. Div. 2007), appeal granted, 194 N.J. 258, 2008 WL 922730 (2008).

[FN2] *Serrano v. South Brunswick Tp.*, 358 N.J. Super. 352, 817 A.2d 1004 (App. Div. 2003); *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 817 A.2d 1017 (App. Div. 2003).

[FN3] *Burnett v. County of Bergen*, 198 N.J. 408, 968 A.2d 1151 (2009).

[FN3.30] *O'Shea v. Township of West Milford*, 410 N.J. Super. 371, 982 A.2d 459 (App. Div. 2009).

[FN3.70] *O'Shea v. Township of West Milford*, 410 N.J. Super. 371, 982 A.2d 459 (App. Div. 2009).

[FN4] *Gannett New Jersey Partners, LP v. County Of Middlesex*, 379 N.J. Super. 205, 877 A.2d 330 (App. Div. 2005).

[FN5] *Gannett New Jersey Partners, LP v. County Of Middlesex*, 379 N.J. Super. 205, 877 A.2d 330 (App. Div. 2005).

[FN5.30] 406 N.J. Super. 1 (App. Div. 2009).

[FN5.70] 405 N.J. Super. 386 (App. Div. 2009).

[FN6] *Michelson v. Wyatt*, 369 N.J. Super. 611 (App. Div. 2005).

[FN7] *North Jersey Media Group Inc. v. State, Dept. of Personnel*, 389 N.J. Super. 527, 913 A.2d 853 (Law Div. 2006).

[FN8] 198 N.J. 274 (2009).

§ 12:5. Local compliance with the Right to Know Law

The agency to which a request for records is made under the Open Public Records Act (OPRA) is required to produce sworn statement by agency personnel setting forth in detail the following information: (1) the search undertaken to satisfy the request, (2) the documents found that are responsive to the request, (3) the determination of whether the document or any part thereof is confidential and the source of the confidential information, and (4) a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.[FN0.50] The sworn statement produced by an agency in response to a request for records under the Open Public Records Act shall have appended to it an index of all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential; this index is essentially a privilege log that must provide sufficient information respecting the basis of the privilege-confidentiality-exception claim vis a vis each document.[FN0.70]

As part of the 2001 amendments to the Right-to-Know Law, the Legislature established a Government Records Council.

The Council was established to undertake several important tasks:

1. to provide technical assistance to local governments on compliance with the law; and
2. to provide a method for mediating disputes between request orders for information and custodians of records who has denied the information requested.[FN1]

The Council will consist of three (3) public members and the Commissioners of Education and Community Affairs or their designees. The tasks of the Commission are as follows:

- 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;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable

employees of the council during regular business hours which shall 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 counsel when access has been denied.

Beyond mediation, the Commission has the ability to hear and decide cases, to refer them to an administrative law judge. Appeals from decisions of the Commission go to Appellate Division.

Citizen's underlying claim of police misconduct was not within the province of the Government Records Counsel to resolve, and thus Counsel was not required to address the issue when considering citizen's Open Public Records Act request for information about his criminal investigation.[FN2]

[FN0] Of The New Jersey Bar.

[FN0.50] N.J.S.A. 41:1A-1 et. seq. See also Paff v. New Jersey Dept. of Labor, 392 N.J. Super. 334, 920 A.2d 731 (App. Div. 2007).

[FN0.70] N.J.S.A. 47:1A-1 et. seq. Paff v. New Jersey Dept. of Labor, 392 N.J. Super. 334, 920 A.2d 731 (App. Div. 2007).

[FN1] 2001 N.J. Laws ch. 404, § 8.

[FN2] Bent v. Township of Stafford Police Dept., Custodian of Records, 381 N.J. Super. 30, 884 A.2d 240 (App. Div. 2005).

§ 12:6. Time for compliance with requests

The legislative delegation of authority to a custodian of government records to adopt a form for use in making Open Public Records Act requests that includes specific directions and procedures for requesting a record extends to prescribing the method by which an OPRA request must be transmitted to the agency, and custodians of government records may prohibit persons from submitting requests for government records by fax.[FN2]

However, the Appellate Division held that requests for OPRA records should utilize the forms provided by the custodian of the records, but no custodian shall withhold such records if the written request for such records, not presented on the official form, so long as the request contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form.[FN3]

It would appear, in most instances, that the law simply requires an answer to the request

within seven business days. As long as the answer is not a denial, but a reasonable statement as to when the information will be available if it is not currently available, it would appear that the custodian would be in compliance with the requirements of the law.

The Open Public Records Act does not contemplate wholesale requests for general information to be analyzed, collated, and compiled by the responding government entity, and it is the requestor's obligation to specifically describe the document sought, is essential to the agency's obligation and ability to provide a prompt response.[FN4] The Appellate Division has found that a five-page, thirty-nine paragraph request for documents from the Council on Affordable Housing under the Open Public Records Act did not specifically identify the documents sought, as required by OPRA, and thus, COAH was not required to produce the documents within seven business days under OPRA.[FN4.50]

For example, in *Mason v. City of Hoboken*,[FN5] the City, which responded to requestor's Open Public Records Act request for general ledgers for two fiscal years one day beyond the statutory eight-day limit, carried its burden of proving that requestor's lawsuit was not the catalyst for its release of records, and thus requestor was not entitled to attorney fees, where city's response included a copy of a memo written by city's business administrator dated the seventh business day after request, which advised that one ledger should be available a week later, and the other ledger one week after that. The Business administrator's mother was critically ill and suffered a massive and ultimately fatal heart attack during the relevant time frame, which complicated city's efforts to respond, the day after requestor filed her lawsuit, city advised her that the requested records were available to be picked up, and business administrator later certified that the records would have been provided on the same day they were disclosed absent any lawsuit.

The short timeframe within which custodians of public records must respond to document requests under Open Public Records Act does not afford the custodian time to speculate about what the requestor seeks, research, or survey agency employees regarding the request; consequently, the requestor's obligation is to specifically describe the document sought.[FN6]

[FN4] Of The New Jersey Bar.

[FN5] N.J.S.A. 47:1A-5.

[FN6] *Paff v. City of East Orange*, 407 N.J. Super. 221, 970 A.2d 409 (App. Div. 2009), certification denied, 200 N.J. 476, 983 A.2d 201 (2009).

[FN7] *Renna v. County of Union*, 407 N.J. Super. 230, 970 A.2d 414 (App. Div. 2009).

[FN8] *New Jersey Builders Ass'n v. New Jersey Council on Affordable Housing*, 390

N.J. Super. 166, 915 A.2d 23 (App. Div. 2007).

[FN4.50] New Jersey Builders Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 915 A.2d 23 (App. Div. 2007).

[FN5] Mason v. City of Hoboken, 196 N.J. 51, 951 A.2d 1017 (2008).

[FN6] Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445, 968 A.2d 187 (App. Div. 2009).

§ 12:7. Right to Know Law—Remedies when records are refused

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of the P.L. 2001, c. 404 (C. 47:1A-7).

The right to institute any proceedings under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.[FN1]

Open Public Records Act actions in Superior Court to challenge custodian's denial of access to records are subject to 45-day statute of limitations.[FN1.50]

The amendments provide clear alternatives, including mediation, and also provide that a requestor that has been denied, may receive reasonable attorney's fees, whereas the prior statute limited fees to \$500.00.

A requestor for public records who settled dispute with the state was found to be the "prevailing party" for purposes of attorney fees.[FN2]

Under the Open Public Records Act, a victorious party gains access to public records and possibly an award of attorney fees, but not civil damages.[FN3] Requestors are entitled to attorney fees under the Open Public Records Act, absent a judgment or an enforceable consent

decree, when they can demonstrate: (1) a factual casual nexus between their litigation and the relief ultimately achieved; and (2) that the relief ultimately secured had a basis in law.[FN4] If an agency fails to respond to an Open Public Records Act request within seven business days, but voluntarily discloses records after a requestor files suit, the burden of proof with respect to attorney fees shifts and the agency is required to prove that the lawsuit was not the catalyst for the agency's belated disclosure.[FN5]

[FN4] Of The New Jersey Bar.

[FN5] N.J.S.A. 47:1A-6.

[FN1.50] N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-12. *Mason v. City of Hoboken*, 196 N.J. 51, 53, 951 A.2d 1017 (2008).

[FN2] *Teeters v. Division of Youth and Family Services*, 387 N.J. Super. 423, 904 A.2d 747 (App. Div. 2006).

[FN3] *Mason v. City of Hoboken*, 196 N.J. 51, 951 A.2d 1017 (2008).

[FN4] *Mason v. City of Hoboken*, 196 N.J. 51, 951 A.2d 1017 (2008).

[FN5] *Mason v. City of Hoboken*, 196 N.J. 51, 951 A.2d 1017 (2008).

§ 12:8. Penalties for non-compliance

A public official, officer, employee or custodian who knowingly and willfully violates P.L. 1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, 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. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L. 1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.[FN1]

[FN0] Of The New Jersey Bar.

[FN1] N.J.S.A. 47:1A-11.

§ 12:10. Retention and destruction of public records

There is a fairly complete statutory scheme in New Jersey which enables local governments to know what documents must be kept, which may be destroyed and when destruction is lawful. The Destruction of Public Records Law[FN1], as discussed in connection with the Atlantic City Convention Center Authority v. South Jersey Publishing Company case,[FN2] establishes a broad definition of public documents.

As used in this act, except where the context indicates otherwise, the words “public records” mean any paper, written or printed book, document or drawing, map or plan, photograph, microfilm, data processed or image processed document, sound-recording or similar device, or any copy thereof which has been made or is required by law to be received for filing, indexing, or reproducing by an officer, commission, agency or authority of the State or any political subdivision thereof, including subordinate boards thereof, or that has been received by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, in connection with the transaction of public business and has been retained by such recipient or his successor as evidence of its activities or because of the information contained therein.[FN3]

The law provides that State officials regulate the entire process of record keeping at the local level.

The Bureau of Archives and History in the Department of Education, with the approval of the State Records Committee established by section six hereof, shall formulate standards, procedures and rules for the photographing, microphotographing, microfilming, data processing and image processing of public records and for the preservation, examination and use of such records, including the indexing and arrangement thereof, for convenient reference purposes.[FN4]

In New Jersey Land Title Ass'n v. State Records Committee, Div. of Archives and Records Management in the New Jersey Dept. of State,[FN5] the Appellate Division held that the State Records Committee had the authority to approve destruction of real property records such as notices of settlement and lis pendens and federal tax liens which had expired.

The Statute also provides careful control of all aspects of image processing and other contemporary techniques. The Bureau of Archives and Records Management in the Department of State provides a schedule for the guidance of local officials.[FN6]

[FNa0] Of The New Jersey Bar.

[FN1] N.J.S.A. 47:3-8.1 to 47:3-8.32.

[FN2] See §§ 10:9, and 12:2.

[FN3] Chapter 140 of the Law of 1994, N.J.S.A. 47:1-11 to 47:1-115 et seq.

[FN4] Chapter 140 of the Law of 1994, N.J.S.A. 47:1-11 to 47:1-115 et seq.

[FN5] New Jersey Land Title Ass'n v. State Records Committee, Div. of Archives and Records Management in the New Jersey Dept. of State, 315 N.J. Super. 17, 716 A.2d 541 (App. Div. 1998).

[FN6] This schedule is found in Appendix A.