



# **E-mails and the Open Public Records Act:**

**New Jersey Government Records  
Council**

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# GRC Contact Information

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# What Is OPRA?

- Open Public Records Act  
N.J.S.A. 47:1A-1 et seq.
- Replaced the “Right to Know Law”
- Increases public’s accessibility to government records (cultural change in New Jersey)
- ***\*Broadly defines a government record\****
- Provides compliance process via the GRC
- Provides for penalties to anyone who knowingly and willfully violates OPRA



# What Is The GRC?

- GRC = Government Records Council
- Duties listed in OPRA - N.J.S.A. 47:1A-7
- Provide assistance to requestors and records custodians
- Adjudicate denial of access complaints
- Five-member Council
- Professional staff



# What Public Agencies Are Covered Under OPRA?

The Times of Trenton v. Lafayette Yard Community Development Corp.,  
183 N.J. 519 (2005)

## ➤ N.J.S.A. 47:1A-1.1

### ➤ Executive Branch

- State Authorities
- State Commissions
- State Colleges and Universities

### ➤ Counties

- Authorities

## ➤ Municipalities

- Fire Districts
- School Boards/Districts
- Planning and Zoning Boards
- Business Improvement Districts
- ??? ("Others")



# Are All Government Records Accessible To The Public?

- Yes...N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1
  - Government records must be readily accessible with *certain exceptions*
  - All limitations on access must be construed in favor of the public
  - Public agencies must safeguard a citizen's personal information (SS#, credit card #, unlisted telephone #, and drivers' license #)
  - Also see prior GRC decisions

# Can A Public Agency Deny A Request?

- ▶ Yes ... N.J.S.A. 47:1A-6
  - Only if the custodian can demonstrate that the denial is authorized by law (burden of proof is on custodian) or if the request is not on the agency's official OPRA records request form.
  - One of the 24 OPRA Exemptions is catch-all for exemptions contained in any other law (not Ordinances) including:
    - State and federal statutory exemptions (i.e. FERPA), State regulation exemptions or Executive Order exemptions
    - Citizen's reasonable expectation of privacy

# Who Is The Records Custodian?

- In the case of a municipality = Municipal Clerk.
- In the case of any other public agency = the officer officially designated by an agency's director or governing body.
- N.J.S.A. 47:1A-1.1

# Who May Be Assessed A Penalty?

- Anyone!
- A public official, officer, employee or custodian who **knowingly** and **willfully** violates OPRA may be assessed a penalty
- N.J.S.A. 47:1A-11

# OPRA Responsibilities of a Custodian

- The custodian must:
  - (1) adopt forms for requests,
  - (2) locate and redact documents,
  - (3) isolate exempt documents,
  - (4) assess fees and means of production,
  - (5) identify requests that require “extraordinary expenditure of time and effort” and warrant assessment of a “special service charge,” and
  - (6) when unable to comply with a request, “indicate the specific basis.”

NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App.Div. 2007)



# GRC Resources & Complaint Process

## Resources:

- Website – OPRA reference materials
- Inquiry – OPRA guidance requested via e-mail, fax, telephone and mail

## Complaint Process:

- Step One: Denial of Access Complaints
- Step Two: Mediation
- Step Three: Adjudication



# E-mails and the Open Public Records Act:

GRC Decisions



# Government Employees Must Forward Requests or Direct Requestor

## ➤ Neff (2005-101)

- Records recorded: Expense reports
- Custodian acted in accordance with OPRA when he provided the Requestor with the records "made, maintained, kept or received" by his agency, but directed the Requestor to the designated records custodians of other agencies for the remaining records requested.
- If an officer or employee of a public agency receives an OPRA request, they **must forward the request** to the records custodian or direct the requestor to the records custodian pursuant to N.J.S.A. 47:1A-5.h.



# Location of Government Record Not Always Relevant

- Meyers (2005-127)
  - Requested records: E-mails from Mayor's personal e-mail account
  - Custodian claimed that the e-mails were not government records because they were not maintained in the custodian's files
  - The Council concluded that the Mayor conducted government business through personal e-mail account, thus making those e-mails government records according to the definition of a government record in OPRA. N.J.S.A. 47:1A-1.1.

## Location of a Government Record Not Always Relevant (cont'd)

### ➤ Johnson (2007-107)

- Complainant requested e-mails to or from Councilman Hugh Sharkey between the date of October 1, 2006 and October 20, 2006 regarding a meeting held on November 1, 2006.
- The Custodian attempted to obtain records from Councilman Sharkey several times, including after the GRC's Interim Order to provide all e-mails responsive.
- This complaint was referred to OAL, and Councilman Sharkey was found to have knowingly and willfully violated OPRA.



# Advisory, Consultative & Deliberative ("ACD") – Meeting Minutes

## ➤ Parave-Fogg (2006-51)

- Requested records: Governing body meeting minutes
- The Custodian asserted that she would release the requested meeting minutes when they are approved by the governing body.
- The GRC ruled that **draft, unapproved meeting minutes** are exempt from disclosure as ACD.
- Inter-agency or intra--agency advisory, consultative, or deliberative material is not included within the definition of a government record. N.J.S.A. 47: 1A-1.1.



# GRC Lacks Authority Over Records Retention

## ➤ Toscano (2007-296)

- Custodian's Response: No records responsive exist
- The NJ Dept of State - Division of Archives and Records Management (DARM) approved records retention schedule which allowed the destruction of the requested records before the request was made
- Council ruled that it does not have authority over records retention pursuant to N.J.S.A. 47:1A-7.b.

# Sufficient Search for Records

- Searching for records
  - When a complaint is filed before the GRC, a Custodian is required to specifically describe the search undertaken to satisfy the records request pursuant to Paff v. Dept. of Labor, 392 N.J. Super.334 (App.Div. 2007).
- Sufficient search for records responsive to an OPRA request for e-mails
  - The GRC has not yet decided on what constitutes a sufficient search for e-mails, such as whether a Custodian is required to search archives or backups.