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# Top 10 OPRA Mistakes & Hot Tips For Making Access Easier for Requestors

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# About CJ Griffin

- **I focus my practice on OPRA and media law issues**
    - Represent all varieties of OPRA requestors on *fee-shifting* basis:
      - Newspapers, bloggers, and online publications
      - Non-profit organizations; activists, and concerned citizens
    - Media Law:
      - Shield Law
      - First Amendment and Courtroom Access
      - Defamation defense (libel, slander, privacy; retraction/correction)
      - Prior restraints/gag orders
  - **Some of my published cases:**
    - N. Jersey Media Group v. Lyndhurst: UFRS; officer names; dash cams in police shooting case
    - Scheeler v. Atlantic Cnty Joint Mun. Ins. Fund: no citizenship requirement for OPRA
    - Wronko v. NJSPCA: holding NJSPCA subject to OPRA
    - N. Jersey Media Group v. Office of Gov.: willful violation penalties available in court
    - In re Firemen's Association: whether agencies can sue requestors
    - Brennan v. BCPO: scope of privacy provision (*amicus*)
    - Paff v. Ocean Cnty Prosecutor Office: dash cam (*amicus*)
    - Gilleran v. Twp. of Bloomfield: security cameras
    - Libertarians for Transparent Gov't v. GRC: draft meeting minutes
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# Top 10 “Mistakes”\*

**\*Actions that make access to public records unnecessarily difficult and really irk records requestors**

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# Mistake #1

## **Making it impossible to find out who the Records Custodian is or how to submit an OPRA request**

- While we know that the Clerk is the statutory Records Custodian, the public generally knows very little about OPRA
  - On many town websites, it is impossible to even determine how to contact the clerk or to submit an OPRA request
  - It is especially difficult to figure out who the Records Custodian is for Counties, School Boards, and other agencies.
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# Hot Tip

- Predominantly display the Records Custodian's name, email address, mailing address, and phone number both on the agency's website and on any OPRA request form
  - Consider a separate "OPRA" tab on the homepage of agency's website
  - Notify your officers and employees that if any of them receive 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).
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# Mistake #2

## Insisting that a requestor use the agency's OPRA Request Form

- Renna v. City of Union, 407 N.J. Super. 230 (App. Div. 2009): while it is preferable that a requestor use a form, a request cannot be denied because the form is not used.
- Insisting on completion of the form only slows down access.

**Hot Tip**: Just don't do it. 😊

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# Mistake #3

## Failing to open OPRA requests upon receipt, thus failing to grant “immediate” access to certain records

- **Immediate access** should “ordinarily” be granted to budgets, bills, vouchers, contracts, collective bargaining agreements, individual employment contracts, and public employee salary and overtime information. N.J.S.A. 47:1A-5(e)
- “Immediate” means as immediately as possible – **on the spot unless** in storage or archived, in use, or requires a medium conversion. If request is made by email, then within 24 hours.
- N.J.S.A. 47:1A-3(b) requires access to certain enumerated information about crimes within 24 hours of a request.

By failing to open an OPRA request as soon as it comes in, you may be denying a requestor timely access to public records.

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# Mistake #4

## Automatically taking an extension for every OPRA request

- An agency must respond to most requests “**as soon as possible**,” “but no later than” *7 business days*.
  - Extensions should not be automatic and routine!
    - OPRA says a record must be produced within that timeframe unless it is “not archived or in storage.” N.J.S.A. 47:1A-5(i). “If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request.”
    - Extensions could be a way to “reasonably accommodate” a voluminous request, but otherwise should be reserved solely for situations where a record is in storage or archived
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# Hot Tips

## Time management:

- Open OPRA requests as soon as received and immediately figure out the deadline for each records requested.
  - Acknowledge receipt of the request and notify the requestor when an agency response to each requested record due.
  - Immediately send request to other departments that hold the records, so that you can ensure a response will be available within 7 business days
  - Notify other departments when it is a record subject to “immediate access”
  - If a record is available sooner than 7 business days, produce it!
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# Mistake #5

**Just because you *can* withhold a record, doesn't mean you *should* or *must***

- Many OPRA exemptions are permissible, meaning an agency has the statutory right to claim the exemption to withhold the record but they are not obligated to shield it from the public
  - Exemptions that could be waived to benefit transparency:
    - Advisory, consultative, and deliberative (ACD)
    - Criminal Investigatory Records & Ongoing Investigation Exemptions
    - Any governmental privilege (official information, attorney-client, work product, etc.)
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# Hot Tip

**Think about the public's interest in transparency and encourage decision-makers to release the record pursuant to the common law**

- NJMG v. Lyndhurst, 229 N.J. 541 (2017): common law access to dash cams
  - Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2011): common law right to records that reveal the type of health coverage elected by eligible employees, officials, & retirees
  - Shuttleworth v. City of Camden, 258 N.J. Super. 573 (App. Div. 1992): common law right to autopsy report
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# Mistake #6

**Failing to identify any exemption at all; failing to identify which exemption applies to which requested record; failing to identify which exemption applies to redacted content**

- OPRA requires a records custodian to state the “specific basis” for denying access to any record or portion of a record. N.J.S.A. 47:1A-5(g).
  - Many requestors will seek more than one category of record per an OPRA request: each category needs a specific response
  - If your response is unclear, you’ll inevitably have follow-up questions
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# Hot Tip

**Utilize the templates provided in the GRC's "Custodian's Toolkit!"**

- If a record is redacted and multiple exemptions might apply to different portions of the record, make sure to include a legend so the requestor can tell which exemption applies to which redaction
  - If possible, where a requestor seeks several categories of records, attach a separate PDF for each responsive category
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# Mistake #7

**Insisting a records requestor send in 5 cents in order to obtain the records.**

- Though you may technically be able to charge 5 cents when a copy is needed, forcing a requestor to come to city hall or get out a check book to write a 5 cent check is only going to irritate the requestor and unnecessarily delay access

**Hot Tip:** Encourage your agency to pass a policy that small copying charges can be waived. Or, kindly tell the requestor they can drop off a nickel the next time they're in city hall.

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# Mistake #8

## Unlawfully imposing service charges

- Special service charges for permissible for “extraordinary” requests. N.J.S.A. 47:1A-5(c).
    - There is a lot of GRC case law that a few hours of time is not “extraordinary”
  - Service charges must be reasonable and charged at an hourly rate of lowest level employee capable of fulfilling request
    - You cannot charge a requestor for your attorney’s hourly rate to review records
  - You must give the requestor advanced notice and an opportunity to object before you fulfill the request
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# Hot Tips

The imposition of a service charge is dangerous and likely to invite litigation. They are seen as tools to discourage requestors from following through on a request.

Most requestors cannot afford to pay *anything* for public records, so try to accommodate most requests without a charge.

Do not impose the hourly rate of outside service professionals as a service charge unless you are certain you can convince a court that it was absolutely necessary and no one in-house could fulfill the request.

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# Mistake #9

## Letting other departments dictate that a record should be withheld

- The Clerk is the statutory Records Custodian and is tasked with responding to OPRA requests. You know the law—other employees likely do not.
- Police departments notoriously want to deny access to everything

### Hot Tips:

- Do not allow any department to directly respond to a request unless you review it—you will be named in the lawsuit, not them
  - Push back against departments that insist that a record is exempt if you believe it is not
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# Mistake #10

**Not cooperating with the requestor; refusing to be flexible; and assuming every requestor is a “gadfly”**

- You know OPRA very well—the majority of citizens have never even heard of OPRA
  - Records requestors need your assistance—these records belong to us and you are our custodian and point of contact!
  - Some people can be cantankerous or difficult, but *most* requestors want government records for legitimate reasons and are not seeking solely to harass you—I promise.
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# Hot Tips

- If a request does not meet the specificity requirements of MAG Entertainment, etc, don't just send the requestor a template denial: speak to them in laymen's terms and help them figure out how to modify the request so that it is valid
  - Offer to call a requestor so you can help them figure out what they need.
  - If a request is overly broad or voluminous, suggest an alternative (i.e. reduced date range)
  - We know requestors aren't allow to "seek information," but if you have it—consider answering the question.
  - A friendly attitude towards a requestor goes a long way to ensuring a positive experience for everyone
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