The Road To OPRA: Basics and Recent GRC Decisions

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Government Records Council

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The Most Important Number Today!

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OPRA Basics

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WHAT IS OPRA?

- The New Jersey Open Public Records Act. N.J.S.A. 47:1A-1 et. seq. ("OPRA").
- Effective July 2002, OPRA replaced the former Right to Know Law and broadly expanded the definition of a public record. Almost 20 Years!!!
- OPRA created the Government Records Council ("GRC"). N.J.S.A. 47:1A-7.
- OPRA authorizes a complaint process via either the GRC or Superior Court. N.J.S.A. 47:1A-6.

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What OPRA is NOT Supposed to Be!

1. I'll get you ...
2. And your little dog too.

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Pay ~~No~~ Attention to the Agency Behind the Curtain

Among other duties, the Government Records Council (GRC):

- Adjudicates denials of access (quasi-judicial).
- Administers a mediation program.
- Prepares informational materials and provides training.
- Operates an OPRA hotline (1-866-850-0511).

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OPRA is Not a Mandatory Process

- OPRA applies to those requests where the requestor chooses to invoke the statute.
- A request *should be* on an official OPRA request form. However, use of the form is not mandatory. See Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009): "the form should be used but no request . . . should be rejected if such form is not used."

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Are there other ways to request records?

- Common law requests.
- Discovery requests, which is not the same as OPRA. See Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).
- Administrative/Informal requests (example: requestor comes to Clerk's counter and orally asks to review minutes book).
- Other court processes (*i.e.* subpoenas, court orders)
  - GRC has not adjudicatory authority

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Lions and Tigers. And Bears?

- Anyone can request records under OPRA!
- OPRA allows for anonymous requests
- Commercial Requestors
- Out-of-State Requestors: See Scheeler v. Atl. Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018)
- The identity of the requestor may affect their right of access in limited circumstances

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What is a "Public Agency" Under OPRA?

- Every municipality within the State of New Jersey is considered a "public agency." N.J.S.A. 47:1A-1.1.
- Also includes State departments and commissions, school districts, fire districts, the Port Authority of New York/New Jersey, the League of Municipalities, and the Legislature (although most of their records are per say exempt).
- Additional "quasi-governmental" agencies could be considered a "public agency." See Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278, 289-90 (App. Div. 2013)

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Do You Represent the Lollipop Guild?

- Under N.J.S.A. 47:1A-5(a), agencies meeting the following criteria can set limited OPRA hours:
  1. Municipalities with a population of 5,000 residents or less.
  2. Boards of Education with total enrollment of 500 or fewer.
  3. Public authorities with less than $10 million in assets.

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- What times?
  - Not less than 6 regular business hours over not less than 3 business days per week or the entity's regularly scheduled business hours, whichever is less.
- What in Auntie Em's name does that mean!?!?
  - The GRC interprets that to mean 2 hours a day for 3 days a week, minimum, unless the agency's regularly scheduled business hours are less.

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What is a "government record" under OPRA?

- The default answer is all records that are made, maintained, kept on file, or received in the course of official business. N.J.S.A. 47:1A-1.1.
- However, exemptions within OPRA, other statutes, regulations, executive orders, *etc.* may effectively exempt access to records in part of whole.

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Who is the official records custodian?

- Municipality - the municipal clerk. N.J.S.A. 47:1A-1.1
  - Municipalities may officially designate custodians in sub-departments "by formal action." The GRC will recognize separate custodians by division/department when that custodian has been adequately publicized to the public.
- Non-municipal agencies designate their custodian "by formal action."

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What is Government Without Forms?

- OPRA requires every public agency to adopt an official OPRA request form.
- Required form criteria prescribed by N.J.S.A. 47:1A-5(f). The GRC's Model Request Form is also available for download.
- Agencies may create their own request form but be careful. See Wolosky v. Twp. of East Hanover, GRC 2010-185 (holding that the agency's form not compliant, because it contained potentially misleading information).

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How Does a Requestor Submit an OPRA Request?

- Hand delivery, mail, electronic transmission, or otherwise conveyed to the appropriate custodian. N.J.S.A. 47:1A-5(g).
- Agencies may limit submission options based on technological capabilities. But See Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).
- If an employee other than the custodian receives an OPRA request, ensure they know their obligation under N.J.S.A. 47:1A-5(h).

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How must a custodian respond to an OPRA request?

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- A response must be IN WRITING! No oral responses. No telephonic responses.
- Within required response time.
- By addressing each item requested, either:
  - o Granting access;
  - o Denying access;
  - o Seeking clarification; or
  - o Requesting an extension of time.

  The GRC's top violation finding a "deemed" denial.

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Become a "Doctor of Thinkology" Today!

1. When is my deadline to respond?
2. Is this a valid OPRA request?
3. Do I have enough information to fulfill request?
4. Will the request require a special service charge?
5. Substantial disruption of agency operations?
6. Can I obtain records responsive to request?
7. Do the records or portions thereof fit into any of OPRA's exemptions?
8. Must I redact, convert to requested medium, calculate appropriate fees?
9. Can I provide records via the requested method of delivery?
10. If I must deny, can I do so with legal basis in writing?

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When is a response to an OPRA request due?

- N.J.S.A. 47:1A-5(i) **"As soon as possible, but not later than seven business days after receiving the request."**
- Exceptions include "immediate access" records, that information contained in N.J.S.A. 47:1A-3(b), and during a State of Emergency.
- Remember, the most common OPRA violation: "Deemed" denial. N.J.S.A. 47:1A-5(i).

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- Day 1 starts the day after the custodian receives the request.
  - o Assuming no holidays or other closings, if a request is received on Monday, when is it due?
- All responses must be in writing. N.J.S.A. 47:1A-5(i).

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Immediate Access

N.J.S.A. 47:1A-5(e).

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.

- See Renna v. Cnty. of Union, GRC 2008-110.
- The response itself must be immediate. Herron v. Twp. of Montclair, GRC 2006-178.
- Part of a larger request? Kohn v. Twp. of Livingston (Essex), GRC 2011-330.

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Information Concerning a Criminal Investigation

N.J.S.A. 47:1A-3(b).

Certain information regarding a criminal investigation must be disclosed within 24 hours or as soon as practicable.

- 2 Categories
  - o when crime is reported but no arrest yet made,
  - o if an arrest has been made.
- Caveat: information may be withheld if determined to jeopardize: 1) the safety of any person; or 2) the investigation in progress

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We Aren't in Kansas Anymore: A Post-Public Health Emergency Exercise

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State of Emergency

- On March 20, 2020, P.L. 2020, c. 10, amended N.J.S.A. 47:1A-5(i) to provide that the response time frame "shall not apply" during a declared State of Emergency or public health emergency.
  - https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20(Final).pdf.
- On June 4, 2021, P.L. 2021, c. 104 removed the moratorium on the response time frame effective immediately.
  - https://www.nj.gov/grc/news/alerts/GRC%20Special%20Statement%202021-01%20(Final).pdf.

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Calling in Back-up

- Best practices dictate that an agency should designate a substitute custodian to receive/fulfill requests in the custodian's absence. See Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015).
- Agencies may also choose to designate departmental custodians. See Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)

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What Does the GRC Consider a Sufficient Response?

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A proper response to an OPRA request:

- Is in writing within seven (7) business days!!!
- (Exception for immediate access and 3(b))!!!!
- Grants access, denies access, seeks clarification, or requests an extension of time (including an anticipated deadline date) w/in the appropriate response time.
- Addresses each record requested. Stand by!
- Addresses requestor's preferred method of delivery.
- Provides an account of the actual cost of duplicating the records, if any.
- If special service charge applies, provides estimate and gives requestor opportunity to accept or reject.
- Includes index that identifies the specific legal basis for a denial of access (including redactions).

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Lawful Basis for Denial

- Custodians must provide a lawful basis for denial *at the time of denial*.
- This includes outright denials and redactions. You cannot merely say, "it's exempt, so go away!"
- Examples: Dear requestor:
  - With respect to request No. 3, Jane Smith's social security number is redacted because social security numbers are exempt from public access pursuant to N.J.S.A. 47:1A-1.1.
  - The letter from John Smith, Esq., to Mary Jones, dated January 4, 2010, is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material that could divulge strategy.

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Extensions of Time to Respond

- An extensions of time to a date certain for legitimate reasons (examples: records in storage, medium conversion, voluminous request) is a lawful response. Papiez v. Cnty. of Mercer, GRC 2012-59
- OPRA does not limit the number of extensions; however, the GRC has ruled on whether extensions were warranted and reasonable. See Ciccarone v. N.J. Dep't of Treasury, GRC 2013-280.
- Failure to grant/deny access by extended deadline date results in "deemed" denial. N.J.S.A. 47:1A-5(i).

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Seeking Clarification

- Seek clarification of the request from the requestor. See Leibel v. Manalapan Englishtown Reg'l Bd. of Educ., GRC 2004-51.
- Clarification request must be in writing within the required response time.
- Response time stops until requestor responds. Time begins anew. Moore v. Twp. of Old Bridge, GRC 2005-80.

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Overly Broad and Invalid Requests

- An OPRA request is invalid when it fails to identify with reasonable clarity the specific government records sought.
- The validity of an OPRA request typically falls into three (3) categories:
  - "Any and all" requests seeking "records" generically, *etc.* and requiring a custodian to conduct research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).
  - Requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).
  - Requests that are either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

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Overly Broad and Invalid Request Examples

- **Overly Broad:** "any and all records connected to the construction of the new high school."
- **Valid:** "For the period from January 1, 2016, to March 1, 2016, any and all e-mails between Jane Doe and John Smith regarding the plumbing contract for the high school."
- **Research:** "all meeting minutes from 2011 in which the Town Council discussed ABC Towing Company."
- **Search:** "all Town Council meeting minutes from calendar year 2011."

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Be careful, though:

- The Court held that a request seeking "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present" was valid. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).
- Paff v. Galloway, 229 N.J. 340 (2017), where a requestor asked for an e-mail log showing the sender, recipient, date, and subject matter of e-mails of certain employees over a specific period of time. In reversing the Appellate Division, the Supreme Court rejected the agency's position, essentially contending that producing the e-mail log did not amount to creating a new record.

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Records Not in Physical Possession? Obligations

- It is reasonable that a custodian might not have physical custody of all records maintained by agency.
- A custodian should document attempts to access records from other departments & personnel.
- A custodian ideally should keep requestor informed of attempts to gain access to records.
- A custodian cannot be held responsible if another employee obstructs access if the custodian can prove attempts made to gain access to the records.

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I'm Melting! O, What a World!

- If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record(s) only *after* attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. N.J.S.A. 47:1A-5(g).
- This is a subjective determination based on the circumstances and an agency's resources available to fulfill a request.

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- Caggiano v. N.J. Div. of Consumer Affairs, GRC 2007-69: The Council ruled that the agency acted reasonably in trying to accommodate the requestor and properly met its burden of proving a substantial disruption of operations.
- **Conversely** Caldwell v. Vineland Bd. Of Educ. (Cumberland), GRC 2009-278: The Council held that the custodian violated OPRA by denying access under the exemption without trying to reach a reasonable accommodation.

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Redactions Are For Redactors

Redaction means editing a record to prevent public viewing of material that should not be disclosed. Words, sentences, paragraphs, or whole pages may be subject to redaction.

Custodians should manually "black out" the information prior to providing the copy to the requestor. Ensure that your redactions cannot be undone or seen through.

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- A redaction should be made using a "visually obvious method." White out is problematic. See Scheeler v. City of Cape May, GRC 2015-91.
- If an electronic document is subject to redaction (*i.e.* word processing or Adobe Acrobat files), custodians should be sure to delete the material being redacted. Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes.

** **Custodians must identify the legal basis for <u>each</u> redaction!!**

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Do I Really Have to Redact This Whole Page?

- Custodians can use a full sheet of paper in the packet of responsive documents to indicate that the entire page was redacted and that the page should cite to the statutory exemption.

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Medium: The Requestor's Prerogative (Usually)

- A custodian must permit access to government records in the medium requested. N.J.S.A. 47:1A-5(d).
- If custodian does not maintain record in medium requested, he/she must:
  - Convert the record to the medium requested, or
  - Provide a copy in "some other meaningful medium" N.J.S.A. 47:1A-5(d).
- GRC interprets "meaningful" as meaningful to the requestor, not just convenient for the Custodian.
- But See Wolosky v. Twp. of Sparta, 2012 N.J. Super. Unpub. LEXIS 2717 (App. Div. 2012)

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- Obtain records responsive from appropriate departments/personnel. That includes third parties and agencies that are part of a Shared Services Agreement.
  - Burnett, 415 N.J. Super. 506.
  - Michalak v. Borough of Helmetta (Middlesex), GRC 2010-220
- Again – the custodian is always on the hook, but other employees impeding access to government records can be found in violation of OPRA and can be fined.

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The "Gold Standard" Road

- N.J.S.A. 47:1A-5(b) provides:
  - Flat fee of $0.05 per page for letter sized pages and smaller;
  - Flat fee of $0.07 per page for legal sized pages and larger.
  - Any public agency whose actual costs to produce paper copies exceed the $0.05 and $0.07 rates may charge the actual cost of duplication.
  - Electronic records must be provided FREE OF CHARGE (*i.e.*, records sent via e-mail and fax).
  - Must charge the actual cost to provide records in another medium (*i.e.* computer disc, CD-ROM, DVD).

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But Were The Slippers Silver or Red?

- OPRA allows an agency to charge fees "prescribed by law or regulation" N.J.S.A. 47:1A-5(b).
- Example: Fees for Auto Accident Reports
  - N.J.S.A. 39:4-131 "If copies of reports are requested other than in person, an additional fee of up to $5.00 may be added to cover the administrative costs of the report . . . ."

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Special Service Charge

- Special service charges for "extraordinary" requests must be warranted and reasonable and based on actual direct cost. N.J.S.A. 47:1A-5(c).
- Actual direct cost means hourly rate of lowest level employee capable of fulfilling request (no fringe benefits).
- Only warranted when:
  - Copies cannot be reproduced by ordinary copying equipment in ordinary business size.
  - Accommodating request involves an extraordinary expenditure of time and effort.

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- Labor fee for extraordinary/voluminous requests.
- The charge must be estimated in advance, prior to the charge being incurred.
- Important – the requestor must agree to pay.
- An agency cannot just incur the charge, invoice the requestor, and then send him to a collections agency if he fails to pay.

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- Case-by-case determination.
- Flat-Rates? Carluccio v. N.J. Dep't of Envtl. Prot., GRC 2008-10.
- An ordinance is problematic.
- GRC's "14 Point Analysis"
  - Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191 (Law Div. 2002).
  - Fisher v. Dep't of Law & Pub. Safety, Div. of Law, GRC 2004-55.

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Medium Conversion

- There may be fees associated with medium conversion as set forth in N.J.S.A. 47:1A-5(d):
  - A custodian may impose a charge, where applicable, related to conversion for:
    - Extensive use of technology.
    - Labor for programming, clerical and supervisory assistance that may be required.
- Outside Vendors? See O'Shea v. Pine Hill Bd. Of Educ. (Camden), GRC 2007-192.

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There's No Place Like Home . . . Addresses

- OPRA's legislative findings state "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." N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009)
- Decisions on privacy are always made on a case-by-case basis by balancing the requestor's need for the information against the agency's need to keep the information confidential.

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Privacy, cont.

The GRC has routinely upheld a custodian's redaction of home addresses and home telephone numbers due to privacy concerns.

However, that position is not universal.

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Somewhere Over the Rainbow

- Excessive and harassing requests are a hot topic amongst the custodial community.
- **Simply stated: good luck!**
- Agencies have encountered mixed results when attempting to restrict an individual rights under OPRA.

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"Are you a good witch or a bad witch?"

- A public official, officer, employee or custodian who knowingly and willfully violates OPRA and unreasonably denies access under the totality of the circumstances is assessed a monetary penalty.
  - $1,000 for initial violation.
  - $2,500 for second violation within 10 years of initial violation.
  - $5,000 for third violation within 10 years of initial violation.
- The GRC position is that the penalty is paid personally by the individual found in violation, not by the public agency.

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- Knowing and willful = a high standard.
- The GRC has issued eight (8) knowing and willful fines to five (5) different custodians (the GRC has actually issued nine (9) penalties, but the Appellate Division reversed one). One of the five custodians has been fined three times in ten (10) years.
- The Courts can also impose a fine. N. Jersey Media Grp. v. State Office of the Governor, 451 N.J. Super. 282 (App. Div. 2017).

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Prevailing Party Fees

- Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006): A complainant prevails when they achieve the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed.
- See also Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008)

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PPAF, cont.

- Boggia v. Borough of Oakland, GRC 2005-36.
- The Council denied prevailing party fees to the complainant, who was an attorney representing himself. The Council reasoned that "the courts of this state have determined that . . . fee shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney . . . representing himself." See also Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019).

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Recent GRC Decisions

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Dog Licenses

- Bozzi v. City of Jersey City, 248 N.J. 274 (2021)
  - The Supreme Court held that Jersey City did not establish a colorable claim for privacy of dog owner information warranting the application of a privacy test. (citing Brennan v. Bergen Cnty. Prosecutor's Office, 233 N.J. 330 (2018)).
  - The Court reasoned that owning a dog was "inherently, a public endeavor." The Court further reasoned that the Privacy Study Commission's findings were not relevant because same were not codified into OPRA.

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E-mails: Withhold or Redact?

- Golas v. Essex Cnty. Dep't of Corr., GRC Complaint No. 2018-12 (Interim Order dated January 7, 2020)
  - The Council held that the custodian lawfully denied access to certain portions of the bodies of the responsive e-mails.
  - However, following long-standing precedential case law, the Council required the custodian to disclose the e-mails redacting only those exempt portions and disclosing the basic e-mail information. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC 2009-185.

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Personnel Records

- Vandy v. Burlington Cnty. Bd. of Social Serv., GRC Complaint No. 2016-319 (Interim Order dated November 13, 2018)
  - The Council's decision addresses multiple types of personnel records and their disclosability under N.J.S.A. 47:1A-10.

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Social Media

- Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019)
  - The Council held that a custodian unlawfully denied access to records from a GoFundMe campaign set up and managed by the Township Mayor.
  - See also Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018) (holding that the Mayor and Council's Facebook block lists were subject to disclosure); Wronko v. Borough of Carteret, Docket No. MID-L-5499-18 (Order dated January 11, 2019).

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Text Messages

- Verry v. Franklin Fire District No. 1, GRC Complaint No. 2014-387 (July 2015).
- The Council held that a plain reading of OPRA supports that text messages are "government records" subject to disclosure so long as the text messages have been "made, maintained or kept on file . . . or . . . received in the course of . . . official business. . . ." N.J.S.A. 47:1A-1.1. The Council stressed that its determination broadly addresses the characterization of text messages as "government records" and notes that exemptions to disclosure may apply on a case-by-case basis. The Council's determination should therefore not be construed to provide for unmitigated access to text messages.

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Records Accessible on a Website

- Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014):
  - Here, the GRC reversed its prior decision in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC 2009-148 (Interim Order dated June 29, 2010), by providing that custodians have the ability to refer requestors to the exact location on the Internet where a responsive record can be located. Id. at 3-4.
  - However, that does not permit you to say, "It's on our website; find it yourself!"

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GLOMAR Response

- Harmon v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2017-38 (February 2019)
  - The Council held that the custodian lawfully denied access to an OPRA request on the basis that he could "neither confirm nor deny" the exist of responsive records, also known as a "Glomar response."
  - The Council relied on the test derived from N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016):

    [T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

    [Id. at 188.]

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Surveillance Cameras

- Howard v. N.J. Transit, GRC Complaint No. 2018-43 (November 2019)
  - The Council held that the custodian lawfully denied access to surveillance camera footage from a public transit center under N.J.S.A. 47:1A-1.1. See also Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016).

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Draft Documents

- Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018)
  - Draft minutes are exempt from disclosure under OPRA's "inter-agency or intra-agency advisory, consultative, or deliberative [(ACD)] material" exemption. N.J.S.A. 47:1A-1.1.
- Daniel v. Twp. of West Orange (Essex), GRC Complaint No. 2017-163 (May 2019)
  - Draft resolutions are exempt from disclosure under the ACD exemption, even if shared with a third party prior to approval. N.J.S.A. 47:1A-1.1; Eastwood v. Borough of Englewood Cliffs (Bergen), GRC 2012-121.

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