



The Open Public Records Act in New Jersey

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The Open Public Records Act

I. Basis For Acquiring Documents

- A. Subpoena
- B. Common Law
- C. Statutory

II. Differences Between The Common Law and OPRA

- A. Definition of Government Record
- B. Balancing of Interests

Under OPRA, the purpose for requesting the public records is irrelevant. *See Williams v. Board of Education of Atlantic City Public Schools*, 329 N.J. Super. 308, 747 A.2d 809 (App. Div. 2000) cert. denied 165 N.J. 488, 478 A.2d 648. Under the common law, more than citizen status and good faith are necessary when there is a compelling governmental need for confidentiality. *Loigman v. Kimmelman*, 102 N.J. at 105- 106 (1986).

III. OPRA- Initial Issues

- A. Who May Request Records

Under OPRA, any "citizen of this State" has the right to inspect and copy public records. N.J.S.A. 47:1A-1. Under the common law, the applicant must have an interest in the subject matter of the material sought, but the media's role as the "eyes and ears of the public" is usually sufficient to confer standing. *Home News v. New Jersey Dept. of Health*, 144 N.J. 446, 454, 539 A.2d 736 (1996).

- B. What Constitutes A Government Record

"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 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.

(See N.J.S.A. 47:1A-1.1).

C. Application of OPRA To Executive, Legislative And Judicial Records.

1. Executive Records

In general, all government records are subject to access under OPRA, unless specifically exempted. OPRA applies to records of any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof. (See N.J.S.A. 47:1A-1.1). Consequently, records of non-governmental bodies are generally not subject to the law. However, there may be circumstances under which a governmental entity is not excused from its OPRA obligations simply because the requested records are not in its possession. See Burnett v. County of Gloucester, 415 N.J. Super 506 (2010) (finding that “the settlement agreements at issue here [and in the possession of the County's insurance broker, one of the County's insurers, or outside counsel, but not in the possession of the County] were ‘made’ by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.1.”)

2. Legislature

A government record shall *not* include information received by a member of the Legislature from a constituent or information obtained by a member of the legislature concerning a constituent, including but not limited to, information in written form or contained in any e-mail or computer database, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit.

A government record shall also *not* include any memorandum, correspondence, notes, report or other communication prepared by or for the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly accessible report that is required by law to be submitted to the Legislature or its members.

3. Judiciary

OPRA does not address court records. However, New Jersey Court Rule 1:38-1 provides that “Court records and administrative records as defined by R. 1:38-2 and R. 1:38-4 respectively and within the custody and control of the judiciary are open for public inspection and copying” with certain specific exceptions, which are to be “narrowly construed in order to implement the policy of open access to records of the judiciary.”

IV. What Records Are Exempt From Access

- A. OPRA declares that all government records be subject to public access unless exempt from such access by: (i) OPRA, (ii) any other statute, (iii) resolution of either or both houses of the Legislature, (iv) regulation promulgated under the authority of any statute or Executive Order of the Governor; (v) Executive Order of the Governor; (vi) Rules of Court; (vii) any federal law; (viii) federal regulation; or (ix) court order. (See N.J.S.A. 47:1A-1).

Specifically OPRA also exempts the following from the definition of "government record":

- Inter-agency or intra-agency advisory; consultative, or deliberative material. (See definition of ; Information received by a member of the State Senate or Assembly from or regarding a constituent. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- ;Memoranda, letters, notes, reports and any other communication prepared for the use of a member of the State Senate or Assembly. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Photographs, negatives and copies thereof, or videotapes, of a decedent relating to a post mortem examination or autopsy. (See definition of "Government record," N.J.S.A. 47:1A-1.1 and note that there are exceptions to this exception.)
- Criminal investigatory records. (See definition of "Government record," N.J.S.A. 47:1A-1.1, and note that there are exceptions to this exception as set forth in N.J.S.A. 47:1A-3.b.)
- Victims records, except that the victim may have access to his/her own records, (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Trade secrets; proprietary commercial or financial information. This includes data processing software obtained pursuant to a licensing agreement prohibiting disclosure. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Records within the attorney-client privilege. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Buildings and facilities emergency procedures and security information which, if disclosed would jeopardize security of the building or facility or persons therein. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Security and surveillance measures which, if disclosed, would create safety risks for persons, property, electronic data or software. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Information that would give an advantage to competitors or bidders. (See definition of "Government record," N.J.S.A. 47:1A-1.1).

- Information pertaining to sexual-harassment complaints filed with public employers. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Information pertaining to any grievance filed by or against an individual. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Information pertaining to collective negotiations, including documents containing negotiating strategies. (See definition of "Government record," N.J.S.A. 47:1A-1.1 and note that it is assumed "collective negotiations" means "collective bargaining negotiations.")
- Communications with the public agency's insurance carrier, administrative service organization or risk management office. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- Information to be kept confidential pursuant to court order. (See definition of "Government record," N.J.S.A. 47:1A-1.1).
- The portion of any document disclosing Social Security, credit card, unlisted phone or driver license numbers. (See definition of "Government record," N.J.S.A. 47:1A-1.1 but note that there are numerous exceptions to this exception.)
- Various records of public institutions of higher education:
 - (1) Pedagogical, scholarly and/or academic research records and/or the specific details of any including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;
 - (2) Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination;
 - (3) Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;
 - (4) Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access;
 - (5) Information contained on individual admission applications; and

(6) Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

- Biotechnology trade secrets as restricted by federal law. (See N.J.S.A. 47:1A-1.2.)
- Personal information regarding the victim of a crime or the victim's family when the information is being sought by the convict who wronged the victim or by anonymous request. (See N.J.S.A. 47:1A-2.2)
- Files maintained by the Office of the Public Defender that relate to the handling of a case. (See N.J.S.A. 47:1A-5.k.)
- Records exempt from disclosure under any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under authority of any statute or Executive Order; Executive Order; Rules of Court or; federal law, regulation or order. (See N.J.S.A. 47:1A-9.a.)
- Records heretofore exempt from disclosure pursuant to any executive or legislative privilege or grant of confidentiality established or recognized by State Constitution of this State, statute, court rule or case law. (See N.J.S.A. 47:1A-9.b.)
- Personnel and pension records of state and local employees except for the employee's name, title, position, salary, payroll record, length of service, date of termination, reason for termination, amount and type of pension received, and other employee background information which discloses specific experiential, educational or medical qualifications for government employment or for receipt of a public pension, but excluding detailed medical or psychological information (Byrne Executive Order No. 11 (1974));
- N.J.S.A. 47:1A-9(a) provides that “[t]he provisions of this act, P.L.2001, c.404 (C.47:1A-5 et al.), 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 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.”

B. Executive Orders:

By virtue of Executive Orders of six Governors, the following records are not subject to public inspection and copying under the Right to Know Law:

- (i) All examinations conducted by state and local government agencies (Hughes Executive Order No. 9 (1963));
- (ii) Personnel and pension records of state and local employees except for the employee's name, title, position, salary, payroll record, length of service, date of termination, reason for termination, amount and type of pension received, and other employee background information which discloses specific experiential, educational or medical qualifications for government employment or

for receipt of a public pension, but excluding detailed medical or psychological information (Byrne Executive Order No. 11 (1974));

(iii) Records which would disclose information regarding illegitimacy (Hughes Executive Order No. 9 (1963));

(iv) Records concerning morbidity, mortality and reportable diseases of named persons (*Id.*);

(v) Criminal investigation records and centralized criminal records, except that the following information shall be released as soon as practical after a crime has been committed:

(1) where no arrest has been made, information as to the type of crime, time, location and type of weapon, if any;

(2) if an arrest has been made, information as to the name, address and age of any victim unless the victim's family has not been notified or if release of the information would jeopardize the safety of the victim or the victim's family or impair an ongoing investigation;

(3) if an arrest has been made, information as to the suspect's name, age, residence, occupation, marital status and similar background information, the charges brought against the suspect, the amount of bail, and the circumstances surrounding the arrest, including the time and place of arrest, any resistance by the suspect, possession and use of weapons by the arresting officers and the suspect, the identity of the arresting officers, and the length of the investigation (Kean Executive Order No. 123 (1985));

(vi) Tax returns (Hughes Executive Order No. 9 (1963));

(vii) Records relating to petitions for executive clemency. (*Id.*).

(viii)

(a) Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.

(b) All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.

(c) All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.

(d) If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the

preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted. (McGreevey Executive Order No. 26)

(ix) No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure. (McGreevey Executive Order No. 26)

(x) The exemptions from public access that have been proposed by the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs, shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act. (Christie Executive Order No. 47)

(xi) Information concerning individuals as follows:

(i) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

(ii) Information in a personal income or other tax return;

(iii) Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.

(xii) Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.

(xiii) Records of a department or agency in the possession of another department or agency when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 *et seq.* and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

(xiv) Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives and requests for access to them shall be submitted directly to the State Archives.

C. Regulatory Exemptions

1. **Federal laws, regulations or orders.** This exemption incorporates by reference any provision of the United States Code or the Code of Federal Regulations or any federal executive, court or administrative agency orders which require records kept by state or local agencies to remain confidential. See, e.g., 42 U.S.C. § 602(a) (9), requiring confidentiality of records concerning recipients of Aid to Families with Dependent Children; 42 U.S.C. § 247c, requiring confidentiality of AIDS patient records. Review of all relevant federal statutes, regulations and orders dealing with the subject matter of the records sought is necessary in each case to ascertain if there is a confidentiality provision that bars access.

2. **State regulations.** There are numerous confidentiality provisions scattered throughout the New Jersey Administrative Code. See, e.g., N.J.A.C 6:3-2.6, limiting release of student records to "authorized organizations, agencies, and persons"; N.J.A.C 10:49-1.22, providing for confidentiality of Medicaid records; N.J.A.C 10:37-6.79, barring access to mental health records. Review of the regulations dealing with the specific subject matter of the records sought is necessary in each case.

• D. Court Records Exempt

The following court records are excluded from public access:

1. **General.** Records required to be kept confidential by statute, rule, or prior case law consistent with this rule, unless otherwise ordered by a court. These records remain confidential even when attached to a non-confidential document.

2. Internal Records.

(a) Notes, memoranda, draft opinions, or other working papers maintained in any form by or for the use of a justice, judge, or judiciary staff member in the course of performing official duties, except those notes, not otherwise excluded from public access under this rule, that are required by rule or law, e.g., R. 7:2-1(e), to be taken as part of the record of the proceeding;

(b) Records of consultative, advisory, or deliberative discussions pertaining to the rendering of decisions or the management of cases.

3. Records of Criminal and Municipal Court Proceedings.

(a) Discovery materials provided to the Criminal Division Manager's office by the prosecutor pursuant to R. 3:9-1 and R. 3:13-3;

(b) Writs to produce prisoners pending execution of the writ;

- (c) Indictments sealed pursuant to R. 3:6-8(a);
- (d) Records relating to grand jury proceedings pursuant to R. 3:6-7 except as provided by R. 3:6-6(b) and R. 3:6-9(d);
- (e) Records relating to participants in drug court programs and programs approved for operation under R. 3:28 (Pre-trial Intervention), and reports made for a court or prosecuting attorney pertaining to persons enrolled in or applications for enrollment in such programs, but not the fact of enrollment and the enrollment conditions imposed by the court;
- (f) Victim statements unless placed on the record at a public proceeding;
- (g) Expunged records pursuant to N.J.S.A. 2C:52-15;
- (h) Reports of the Diagnostic Center to the extent provided under R. 3:21-3;
- (i) Records relating to child victims of sexual assault or abuse pursuant to N.J.S.A. 2A:82-46;
- (j) Search warrants pursuant to Rule 3:5-4 and the affidavit or testimony upon which a warrant is based, except as provided in Rules 3:5-6(c) and 3:13-3;
- (j) Documents, records and transcripts related to proceedings and hearings required by the Supreme Court pursuant to Doe v. Poritz, 142 N.J. 1, 39 (1995), or subsequent orders of the Court;
- (k) Names and addresses of victims or alleged victims of domestic violence or sexual offenses.

4. Records of Family Part Proceedings.

- (a) Family Case Information Statements required by R. 5:5-2 and Financial Statements in Summary Support Actions required by R. 5:5-3, including all attachments; (2) Confidential Litigant Information Sheets pursuant to R. 5:4-2(g);
- (b) Medical, psychiatric, psychological, and alcohol and drug dependency records, reports, and evaluations in matters related to child support, child custody, or parenting time determinations;
- (c) Documents, records and transcripts related to proceedings and hearings required by the Supreme Court pursuant to Doe v. Poritz, 142 N.J. 1, 39 (1995), or subsequent orders of the Court;

(d) Juvenile delinquency records and reports pursuant to R. 5:19-2 and N.J.S.A. 2A:4A-60;

(e) Records of Juvenile Conference Committees to the extent provided under R. 5:25-1(e);

(f) Expunged juvenile records pursuant to N.J.S.A. 2A:4A-62f and 2C:52-15;

(g) Sealed juvenile records pursuant to N.J.S.A. 2A:4A-62;

(h) Domestic violence records and reports pursuant to N.J.S.A. 2C:25-33;

(i) Names and addresses of victims or alleged victims of domestic violence or sexual offenses;

(j) Records relating to child victims of sexual assault or abuse pursuant to N.J.S.A. 2A:82-46;

(k) Records relating to Division of Youth and Family Services proceedings held pursuant to R. 5:12;

(l) Child custody evaluations, reports, and records pursuant to R. 5:8-4, R. 5:8B, N.J.S.A. 9:2-1, or N.J.S.A. 9:2-3;

(m) Paternity records and reports, except for the final judgments or birth certificates pursuant to N.J.S.A. 9:17-42;

(n) Records and reports relating to child placement matters pursuant to R. 5:13-8(a);

(o) Adoption records and reports pursuant to N.J.S.A. 9:3-52;

(p) Records of hearings on the welfare or status of a child, to the extent provided under R. 5:3-2.

5. Guardianship records and reports maintained by the Surrogate and by the Chancery Division, Probate Part, except the guardianship index, of which only the following information shall be available for public access: (1) minor's or incapacitated person's name, (2) name of the municipality where the minor or incapacitated person resided when the guardianship was created, (3) name of the guardian, (4) docket number, (5) date of the judgment appointing the guardian, and (6) date of the guardian's qualification.

All guardianship records and reports, however, are available to the incapacitated person and the minor upon reaching majority; the incapacitated

person's spouse, civil union partner, or domestic partner; the minor's or incapacitated person's parents and siblings; any adult children of the incapacitated person; the guardian appointed in the action; and any attorneys appearing in the guardianship action on behalf of these persons.

Further, any person may inspect and copy the following guardianship file documents: the guardianship judgment, the Letters of Guardianship, and any subsequent order dealing with the powers or limitations of the guardian, provided any financial information contained in these documents, including information on the amount of the bond, is reacted prior to the documents being made available for review or copying. Any individual or entity seeking other records must demonstrate before a Superior Court judge a special interest in the matter.

V Redaction

N.J.S.A. 47:1A-5(g) requires a custodian to redact from a record those portions the custodian contends are exempt from access and provide the requestor with the balance of the record.

VI. Requesting Access

A. Use Of A Form

N.J.S.A. 47:1A-5(f) provides that the custodian of a public agency shall adopt a form for the use of any person. The form shall provide space for the name, address and phone number of the requester and a brief description of the record sought. The use of the particular form is not, however, required by OPRA.

The Appellate Division held in Renna v. County of Union, 407 N.J.Super. 230 (App. Div. 2009) that all OPRA requests must be in writing but that no custodian shall withhold records if the written request contains the requisite information prescribed by N.J.S.A. 47:1A-5(f) (name, address, phone number and a brief description of the records sought).

B. To Whom Should The Request Be Made

N.J.S.A. 47:1A-5(q) provides that the request shall be conveyed to the custodian. N.J.S.A. 47:1A-1.1 defines a custodian, in the case of a municipality to be the municipal clerk and in the case of other agencies to be the person officially designated by the agency's governing body.

C. Contents of The Request

N.J.S.A. 47:1A-5(f) requires the request contain a brief description of the record sought as well as the name, address, and phone number of the requester

D. Time For Response

N.J.S.A. 47:1A-5(i) directs that custodian shall grant or deny a request for access as soon as possible but not later than seven business days unless the record is archived or in storage or the request would substantially disrupt agency

operations. N.J.S.A. 47:1A-5(e) provides that immediate access should ordinarily be granted to budgets, bills, vouchers, contracts and public employee salary and overtime information.

E. Failure To Respond

N.J.S.A. 47:1A-5(i) provides that the failure of a custodian to respond within seven (7) business dates constitutes a denial.

F. Remedies For Denial

Under OPRA, the remedy for denial of a request for public records is by a prerogative writs action in the Law Division of the Superior Court. N.J.S.A. 47:1A-6. The statute also provides an alternate mechanism, at the sole option of the requester, of filing a complaint with the Government Records Council. Claims under the common law right to know are only cognizable in Superior Court.

The time limit for filing a Complaint in lieu of Prerogative Writs to obtain records from a public agency or official is 45 days from the date of denial. However, another request for the same records can be made at any time by another party, thereby triggering a new 45-day time limit for filing suit. See Shuttleworth v. City of Camden, supra. It is not clear whether a complaint to the Government Records Council will also be subject to the 45-day limit although it is likely that will be the case

N.J.S.A. 47:1A-6 provides, in relevant part, “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.”

G. Sanctions

A requester who prevails in any proceeding shall be entitled to a reasonable attorneys' fee. (See N.J.S.A. 47:1A-6). In addition, a public official, officer, employee or custodian who knowingly and willfully violates OPRA 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 the initial violation, and \$5,000 for a third violation occurring within 10 years of an initial violation that. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

(See N.J.S.A. 47:1A-11).

H. Fees And Costs

Fees for copies have been set by statute. 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.

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

Under certain circumstances a special service charge may be imposed as follows:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred

