

ACCESS TO PUBLIC RECORDS IN NEW JERSEY:
THE OPEN PUBLIC RECORDS ACT (OPRA)
AND ITS ANTECEDENTS

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"A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both."

James Madison

I. Common Law Right to Know

- A. Support for access to public records stretches well back in the common law. Ferry v. Williams, 41 N.J.L. 332 (Sup. Ct. 1879) (earliest New Jersey decision specifically on this issue extensively examines English precedent).
1. Standard Under Common Law: A citizen is entitled to inspect documents of a public nature provided he/she shows the requisite interest therein. Ferry v. Williams, supra at 334.
 2. Public Record: One required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office...the elements essential to constitute a public record are...that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it. Josefowicz v. Porter, 32 N.J. Super. 585, 591 (App. Div. 1954) as cited in Nero v. Hyland, 76 N.J. 213 (1978).

Examples: Accident Reports, Assessment Records, Municipal Hearings, Voter Registration Records, Tax Records, Meeting Minutes (except executive session), Background Investigations, Budgets, Law Enforcement Investigative Reports.

3. Requisite Interest: Threshold condition for access is that a citizen establish an interest in the subject matter of the material, he or she seeks. Interest does not

have to be purely personal. Rather a citizen or taxpayer may be accorded access, when concerned with a public issue, even though individual interest may be slight. Irvval Realty, Inc. v. Board of Public Utility Commissioners, 61 N.J. 366, 372 (1972).

Examples: Citizen access to list of registered voters (Higgins v. Lockwood, 74 N.J.L. 158 (Sup. Ct. 1905)), Casey v. MacPhail, 2 N.J. Super. 619 (Law Div. 1949)); defense of reputation (Nero v. Hyland, supra); newspaper's interest in keeping an eye on public agency proceedings (Red Bank Register v. Board of Educ., 206 N.J. Super. 1, 9 (App Div. 1985)).

4. Balancing Test: The right of access, once requisite interest and the public nature of the document are determined, is not unfettered. There must be a careful balancing of the agency's interest in confidentiality against the public interest in disclosure, including a consideration of whether the "demand for inspection is premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest." Loigman v. Kimmelman, 102 N.J. 98, 112 (1986); South Jersey Publishing Co. v. N.J. Expressway Auth., 124 N.J. 478 (1991); Atlantic City Convention Center v. South Jersey Publishing Co., 135 N.J. 53 (1994).

Examples: General public records of county available, but not confidential records of county prosecutor (Moore v. Bd. of Freeholders, 76 N.J. Super. 396 (App. Div.), modified 39 N.J. 26 (1962)); news agency has right to factual data in reports, but further balancing required for evaluative material (Red Bank Register v. Bd. Of Educ., supra); substantial showing of need for disclosure of informant's identity required for civil case (Cashen v. Spann, 77 N.J. 138 (1978)); rejected candidate for State office denied access to confidential investigatory report because of potential chilling effect on informants and because Governor's executive power in making appointments requires measure of confidentiality (Nero v. Hyland, supra); court may inspect documents *in camera* before determining whether to grant or deny access (Loigman v. Kimmelman, supra); plaintiff in sexual harassment suit granted access to records of employer's handling and disposition of employee's complaints of sexual harassment (Payton v. N.J. Turnpike Authority, 148 N.J. 269 (1996)).

- B. The common law right is unaffected by OPRA. That is, OPRA does not restrict or rescind any of the common law's reach. N.J.S.A. 47:1A-8. Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504 (app. Div.), cert. Den. 182 N.J. 143 (2004).

II. Right to Know Law, N.J.S.A. 47:1A-1, et seq.

- A. Standing: The Right to Know Law, adopted in 1963, eliminated the common law requirements that the requester establish the requisite interest. N.J.S.A. 47:1A-2 states simply that “[e]very citizen of this State, during regular business hours maintained by the custodian of any such records, shall have the right to inspect such records.” Thus, “one need only be a citizen of the State to obtain access to public records.” South Jersey Publishing v N.J. Expressway Auth., *supra* at 49.
- B. Public Records: The class of “public records” was significantly narrower than the practice under common law. Specifically, records were all those “required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official...thereof.” N.J.S.A. 47:1A-2. The class is further restricted by a series of built-in exceptions: statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, federal law, or regulation promulgated under any statute or executive order of the Governor. *Id.*
 - 1. Executive Orders: Executive Order No. 9 by Governor Hughes (1) reaffirmed right of State agency heads (but not local authorities) to regulate public records; (2) specified records that were not deemed to be public, including State agency examination questions, personnel and pension records, records of morbidity, mortality and reported diseases of named individuals, records re illegitimacy, fingerprint cards and related records in criminal investigations, criminal records, personal property tax returns, and executive clemency petitions and related records. The personnel records exception was modified under Governor Byrne by Executive Order 11 to allow the release of certain basic information, but specifically forbade the release of any medical or psychological material. The crime information and fingerprint information exceptions were modified by Executive Orders 123 of Governor Kean and 69 of Governor Whitman.
 - 2. Statutory Exceptions: These are numerous. Some well known ones are: Open Public Meetings Act, 10 N.J.S.A. 10:4-6 et seq. (confidentiality of executive session minutes and related documents); Casino Control Act, N.J.S.A. 5:12-74(e) (information pertaining to applicant's criminal record, family and background considered confidential and shall be withheld except upon court order or order of Attorney General); and Election Law, N.J.S.A. 19:31-10, (public inspection of voter registration forms limited to specific time period).

3. Court Decisions Under Right To Know Law: Confidential records of potential State appointee background check not public records (Nero v. Hyland, supra); criminal investigation records by law enforcement official not public records (River Edge Savings and Loan Ass'n. v. Hyland, 165 N.J. Super. 540 (App. Div. 1979)); regulation requiring local boards of health to keep records of all official actions did not require records of applicant evaluations to be kept and therefore such evaluations were not public records (Collins v. Camden County Dept of Health, 200 N.J.Super. 281 (Law Div. 1984)); working documents to assist board of education in budget process not public records (Home News v. Board of Ed. of Spotswood, 286 N.J. Super. 380 (App Div. 1996)); Rutgers attorneys bills and internal legal billing documents not public records (Keddie v. Rutgers, State University, 148 N.J. 36 (1997)).
4. No Balancing Test: Unlike the common law, there is no balancing of factors on whether to release the records. Keddie v. Rutgers, State University, supra at 44.

III. Open Public Meetings Act, N.J.S.A. 10:4-6, et seq.

- A. The Open Public Meetings Act imposes the obligation to make minutes of meetings promptly available to the public subject to nine specific exceptions including, without limitation, public safety issues, pending or anticipated or pending litigation, collective bargaining agreement negotiations, unwarranted invasions of individual privacy and the like. N.J.S.A. 10:4-12 and -14.
- B. Any claims under the common law or the Right To Know Law that involve meeting records of public bodies must include consideration of the Open Public Meetings Act.

IV. Open Public Records Act, N.J.S.A. 47:1A-1 (OPRA)

A. PURPOSE OF OPRA

The Open Public Records Act, which became effective on July 7, 2002, builds on, but essentially replaces the Right to Know Law, was promulgated for the following reasons:

1. To insure that government records, with certain exceptions, are readily accessible to the public for inspection, examination and or copying.
2. To insure that the public's right of access is constructed in the public's favor;
3. To insure that public agencies secure personal information when its disclosure would violate a "citizen's reasonable expectation of privacy";

4. To establish an administrative appeals process if access to government records is denied,

B. IMPORTANT DEFINITIONS

1. Custodian of government record or "custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.
2. 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.

Generally stated, a government record means any record that has been made maintained or kept on file in the course of official business by a public agency or an officer of that public agency, or that has been received in the course of official business by a public agency or an officer of that public agency.

The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

A government record shall not include information which is deemed to be confidential.

3. Personal Information is that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any persons; 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 Division of Motor Vehicles 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.

4. **“Public agency” or “agencies”** means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean 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.

C. REQUESTS FOR RECORDS (Procedure and Process)

1. **Request Forms**
 - a. A request for access to a government record must usually be in writing and hand-delivered, mailed or transmitted electronically to the custodian of records. An OPRA request cannot be made by telephone.
 - b. Record requests should be made on the request form, adopted by the government entity or, if there is none, then by a letter stating clearly what is requested. Most municipalities have a form that can be obtained from the clerk or from its website.
 - c. The request form requires a brief description of the record sought. The more information that is known about the record, the easier it will be for the Custodian to retrieve it.

2. **Responding to a Request**

- a. The Custodian of Records should fulfill a request as soon as possible but no later than seven (7) business days after the request is received, assuming that the record is currently available and not in storage or archived. (These seven days are counted starting with the day following receipt of the OPRA request).
- b. If the record is in storage or archived and may take longer than 7 business days to retrieve, the Custodian must advise the requester of

this fact within 7 business days. The Custodian should also advise the requester when the record will be made available.

- c. It is acceptable for a Custodian and a requester to agree to a longer time frame for compliance with an OPRA request in instances where large amounts of records or archived records have been requested, when there are staffing issues due to illnesses or vacation schedules. If there is an agreement to such an extension, the agreement should be in writing.
- d. OPRA requires that the public have "immediate access" to some records such as budgets, bills, vouchers, contracts, and employee salary and overtime information. Immediate access applies, however, only to government records that are current and readily accessible to the Custodian. If the aforementioned records are not current and readily accessible, the normal request process is applicable.
- e. Due to OPRA's policy of protecting the privacy of personal information, the Custodian of Records must redact certain information, including but not limited to social security numbers, unlisted phone numbers, drivers' licenses, credit card information, before a particular record is released. This same procedure will be followed even if a requester only wants to view records, not have copies made.
- f. When the requested record(s) are ready, the requester will be notified by phone that the requested records are available for pick-up or inspection.
- g. The Custodian of Records will complete a Public Request Response form. The response form will list the date the requested records are given to the requestor and the total number pages given to the requestor. The response form will also list the documents given to the requestor. The requestor must pay the appropriate copying fee and will be given a receipt for same. The requestor must sign and date the response form acknowledging receipt of the documents requested. The Custodian must complete the response form by signing and dating same following payment of the copying fee.
- h. A copy of the completed response form will be given to the requestor.

D. COSTS FOR COPIES/DUPLICATION OF RECORDS

- 1. N.J.S.A. 47:1A-5 sets forth copying fees if a municipal governing body has not established same. They are duplicating fees for discs, audiotapes and CD Roms.

E. DENIAL OF A REQUEST

1. If the Custodian fails to respond to a requestor within seven (7) business days of the request the failure to respond is deemed by OPRA to be a denial of the request.
2. If a request is denied in whole or in part, the Custodian will list said reason(s) on the Public Records Request Response form and sign and date the section advising the requestor about the right to appeal the denial. A statement of the procedures for appeal will then be attached to the response form.
3. The requestor must sign and date acknowledgement of receipt of the appeal response procedures and a copy of the completed response form will be given to the requestor.
4. Access to records are usually denied for the following reasons which include but are not limited to:
 - a. Those records which OPRA specifically excludes from the definition of a government record.
 - b. The request form was completed improperly.

F. INFORMATION PROVIDED ON A VOLUNTARY BASIS

Governmental units may have a variety of information outlets that, while not required, are useful tools in providing information to the public. These outlets include (but are not limited to) the following:

1. Official Websites which may include the following:
 - o Municipal Code
 - o Calendar of Events
 - o Meeting Schedules
 - o Meeting Minutes
 - o Meeting Agendas
 - o Department Specific Issues
 - o News & Events
2. News Releases
3. Community Publications
4. Public Meetings.

G. INFORMATION EXEMPTED FROM DISCLOSURE

1. OVERVIEW

The Open Public Records Act provides a list of records which are exempted from disclosure. Additionally, records are exempted from disclosure by Executive Orders issued by the Governor, rules of various State agencies, State Statutes, federal laws, court decisions, or Rules of the Court.

2. PURPOSE OF EXEMPTIONS

- a. Citizens have a reasonable expectation of privacy regarding records in the possession of a public agency.
- b. Public safety and security concerns.
- c. To insure unfettered debate, discussion and consideration of issues within public bodies.

3. GENERAL EXEMPTIONS

- a. "ACD" or "Deliberative Material" which includes intra-agency or inter-agency advisory, consultative or deliberative material. (N.J.S.A. 47:1A-1.1).
- b. Information which is deemed to be confidential. (N.J.S.A. 47:1K 1.1).
- c. Records not yet in existence:
 1. A prospective or standing order for records as they become available is not enforceable.
 2. Minutes not yet formally approved.
- d. A request to create a record in order to respond to a request for access.

4. SPECIFIC EXEMPTIONS

- a. Trade secrets, propriety commercial or financial information. (This includes software obtained by a public body under a licensing agreement which prohibits its disclosure). (N.J.S.A. 47:1A-1.1).
- b. Information which would jeopardize security. (N.J.S.A. 47:IA-1 .1).

1. Information pertaining to computer hardware, software and networks.
 2. Information regarding emergency or security information or procedures for any buildings or facility.
 3. Information regarding security measures and surveillance techniques that create safety risks to people, property or computer systems.
- c. Any record within the attorney-client privilege. (This does not include redacted vouchers/invoices). (N.J.S.A. 47:1A-1.1).
 - d. Information which if disclosed, would give an advantage to competitors or bidders. (N.J.S.A. 47:1A-1.1).
 - e. Communications with a public agency's insurance carrier, administrative service organizations or risk management office. (N.J.S.A. 47:1A-1.1).
 - f. Information that must be kept confidential pursuant to court order. (N.J.S.A. 47:1A-1.1).
 - g. Information generated by or on behalf of public employers or public employees in connection with the following:
 1. Any sexual harassment complaint filed with public employer. (N.J.S.A. 47:1A-1.1).
 2. Any grievance filed by or against any employee. (N.J.S.A. 47:1A-1.1).
 3. Information pertaining to collective negotiations including documents containing negotiating strategies. (N.U.S.A. 47:1A-1.1).
 - h. Law Enforcement Material including the following:
 1. Medical Examiner photos or videotapes. (N.J.S.A. 47:1A-1.1).
 2. Criminal investigatory records or related civil enforcement proceedings. (N.J.S.A. 47:1A-1.1).

3. Personal Information regarding the victim of a crime when the information is being sought by the convict who wronged the victim or by anonymous request. (N.J.S.A. 47:IA-2.2).
4. Public Defended investigations. (N.J.S.A. 47:1A-5K).
 - i. Information for which there is an expectation of personal privacy including:
 1. Social security numbers. (N.J.S.A. 47:1A-1.1).
 2. Credit card numbers. (N.J.S.A. 47:1A-1.1).
 3. Unlisted telephone numbers. (N.J.S.A. 47:1A-1.1).
 4. Driver license numbers. (N.J.S.A. 47:1A-1.1).
 - j. Records of an investigation in progress by any public agency where release is inimical to the public interest. (N.J.S.A. 47:1A-3).
 - k. Various records of public institutions of higher education. (N.J.S.A. 47:141.1).
 - l. Personnel and pension records, except that an individual's name, the title, salary, position, payroll record, length of service, date of separation and the reason therefore is disclosable information. (N.J.S.A. 47:IA-10).
 - m. Biotechnology trade secrets. (N.J.S.A. 47:IA-1.2).
 - n. Information received by a member of the State Senate or Assembly regarding a constituent. (N.J.S.A. 47:141.1).
 - o. Memoranda, letters, notes, reports and any other communication prepared for the use of a member of the State Senate or Assembly.
 - p. Library records which contain the names or other personally identifying details pertaining to the users of libraries. (N.J.S.A. 18.73-43.1 et. seq.).
 - q. Records concerning illegitimacy. (Executive Order #9, Section 3d).

H. ENTITIES NOT COVERED BY OPRA

A. Private Businesses

B. Not-for-profit organizations

C. The judicial branch of government.

V. Interplay Between OPRA, Common Law and Court Discovery Procedures

- A. Methods of access to public records include both OPRA and Common Law Right To Know. Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504 (App. Div.), cert. den. 182 N.J. 143 (2004)
- B. Court discovery procedures do not pre-empt OPRA. Both can be used in litigation. Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 543-545 (App. Div. 2005).

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