

# DESPITE STRONG OPPOSITION FROM CERTAIN SEGMENTS, NEW JERSEY OVERHAULS ITS OPEN PUBLIC RECORDS ACT

On June 5, 2024, Gov. Phil Murphy signed new legislation (*P.L. 2024, c.16*) that implements sweeping modifications to New Jersey's Open Public Records Act. It became effective Sept. 3, 2024. Originally enacted in 2002, OPRA has not undergone comprehensive amendment until now. The new legislation addresses many concerns that have been raised by custodians of records over the years.

The legislation was adopted with bipartisan support in both chambers despite strong objections from various advocacy groups that argued that the amendments would lead to less transparency in governmental affairs and enable corruption across the state. In refuting this concern, Murphy stated, "If I believed that this bill would enable corruption in any way, I would unhesitatingly veto it."



In May 2024, the New Jersey Legislature passed a bill that overhauls the state's Open Public Records Act.

## 1. Transparency Enhancements

First and foremost, government records must be made available on a public website to the extent feasible; this may be done through a shared services agreement. Moreover, the law requires the agency to assist the requestor in locating records that are contained on the agency's website. Furthermore, the law provides that OPRA requests can be submitted by form, letter or email, as long as the request includes all of the information required on the agency's adopted OPRA form, and does not include substantially more information and require more than reasonable effort to clarify the information.

## 2. Government Records Council Upgrades

Recognizing the importance of the New Jersey Government Records Council in adjudicating disputes under OPRA and helping unburden the courts, the legislation provides an additional appropriation of \$6 million to help the GRC carry out its work. The amended law also requires the GRC to update its website from time to time to ensure that it is user friendly. The GRC will also be required to include on its website Superior Court cases involving OPRA, so that the public can see how those cases were adjudicated. Additionally, the law requires the GRC to use video-conferencing technology for its meetings and proceedings, so that the public can easily participate without having to travel to Trenton. Lastly, the legislation left intact the ability of the public to file a complaint with the GRC without paying a fee.

## 3. Protected Information Enhancements

The amendment protects certain personal information from release. It includes a definition of "personal identifying information" which, in many cases, must be redacted in any provided records. The protected information includes the portion of any government record disclosing: bank account information; debit card numbers; Social Security number; month and day of birth; driver license number; any telephone number (whether unlisted or listed); and any personal email addresses required for government applications, services or programs. The protection extends to the portion of any document that discloses the personal identifying information of any person provided to a public agency for the sole purpose of receiving official notifications. There is also an exclusion for the portion of any document that would disclose personal identifying information of any person under 18 years of age.

The amendment also addresses release of other information and exempts disclosure of:

- All metadata, except that portion that identifies authorship, identity of editor and time of change.
- Any indecent or graphic images of a person's intimate parts that are captured in a photograph or video recording without the prior written consent of the subject of the photograph or video footage.
- Requests for security alarm system activity and access reports, including video footage, for any public building, facility, or grounds may be denied

where it is deemed to compromise the integrity of the security system by revealing capabilities and vulnerabilities of the system; such requests must identify a specific incident that occurred, or a specific date and a limited time period at a particular public building, facility, or grounds.

- Information that is deemed to provide a competitive advantage to bidders now expressly includes detailed or itemized cost estimates prepared prior to bid opening. The definition of technical or administrative information regarding electronic devices or computer networks is expanded to provide more protection for information which, if disclosed, could jeopardize computer security or related technologies.

#### 4. Procedural modifications

The legislation makes several key changes to OPRA's procedural requirements, including but not limited to:

- Records custodians must adopt a uniform OPRA request form established by the Government Records Council (but requestors still will not be required to use the form).
- Custodians have the discretion to deny requests submitted via letters or emails that do not contain all the information required by the official form, or which include substantially more information than required on the adopted form and require more than reasonable effort to clarify the information.
- Anonymous requests are still permitted, but the requestor will not be able to appeal a denial.
- Requests submitted to other employees of the public agency are not considered submitted until received by the custodian of records.
- The time for a response to a request is extended to 14 business days if the

request is for a commercial purpose, or if records have to be reviewed for purposes of OPRA compliance; the custodian of records must notify the requestor of the extended response time within seven business days.

- Immediate access to budgets, bills, vouchers, contracts (including collective negotiations agreements), individual employment contracts, and public employee salary and overtime information is not required for documents over 24 months old; such

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records must be produced within seven business days.

- A records custodian is entitled to a reasonable extension of any response deadline when necessary due to unforeseen circumstances or circumstances that otherwise reasonably necessitate additional time to fulfill the records request; the custodian shall notify the requestor of the time extension within seven business days after receiving the request.
- Where a government record is available on a public website, the custodian may require the requestor to obtain the record from the website, which

must contain a search bar feature on its homepage; the custodian must provide the requestor with directions to assist in finding the record on the website.

- A custodian may deny a request for mail, email, text messages, correspondence, or social media postings and messages, if 1) the request does not identify a specific job title or accounts to be searched, and is not confined to a discrete and limited reasonable time period and a specific subject matter, or 2) if the custodian determines that the request would require research and the collection of information from the contents of government records and the creation of new government records setting forth that research and information.
- More flexibility is allowed in the medium or format of a records production.
- There is now a rebuttable presumption that fees or charges assessed by a custodian in order to fulfill a request are reasonable.
- A party to a legal proceeding may not submit a records request that is already the subject of a discovery request in the proceeding.
- Requestors have 14 business days to retrieve records once notified that they are available.

#### 5. Controversial Provisions

Perhaps the most controversial modification is to the fee-shifting provision of the original statute. A prevailing party challenging a records denial is no longer automatically entitled to attorneys' fees unless it is determined the public agency unreasonably denied the request, acted in bad faith or knowingly and willfully violated OPRA. The courts or Government Records Council do have the discretion to award attorneys' fees in circumstances that do not call for a mandatory award.

Another important modification to the law is that if a requestor files an action in court or before the GRC to challenge the denial of access to records and the custodian provides the records within seven business days of being served with the lawsuit or Government Records Council complaint, the case must be dismissed. However, the requestor may be entitled to attorney's fees if it can be shown that the custodian knew or should have known that the denial violated OPRA.

Finally, a public agency may now sue to obtain a protective order against a requestor if a court finds by clear and convincing evidence that the requestor sought records with the intent to substantially interrupt the performance of government function. Upon signing the legislation, Murphy specifically addressed this new provision and the concerns about it expressed by advocacy groups. He emphasized that the bar is set high

for the agency to prevail in such suits. He also explained, "I signed an important law last September that protects individuals from meritless lawsuits intended to intimidate them for exercising their free speech rights. I am confident that this 'anti-SLAPP' law will allow individuals to obtain expedited dismissals of any improper lawsuits brought under this new provision of OPRA."

## 6. Recommendations

Public entities should consult with their counsel to review the many areas in which OPRA compliance has been modified by the amendments. Some immediate systemic recommendations include reviewing the entity's records request form and conforming it to the form recently promulgated by the GRC. Public entities should also establish procedural safeguards to ensure that protected information is redacted from any records production.

Finally, the public entity should determine which public records may feasibly be uploaded to a publicly available website. Some items to consider may include: meeting minutes, collective negotiations agreements, various other contracts and the approved budget.

In short, this overhaul to OPRA was long overdue. OPRA is an important piece of public policy legislation that serves important governmental purposes. However, the time had come to make these important amendments to the law after having had the opportunity to evaluate its strengths and weakness over the past 22 years.

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