

June 18, 2024

**GOVERNOR MURPHY SIGNS LEGISLATION IMPLEMENTING SIGNIFICANT
CHANGES TO THE OPEN PUBLIC RECORDS ACT**

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On June 5, 2024, Governor Murphy signed new legislation into effect (P.L.2024, c.16) which implements sweeping modifications to New Jersey's Open Public Records Act ("OPRA"). Originally enacted in 2002, OPRA has not undergone comprehensive amendment until now.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; it will become effective on September 3, 2024.

1. Protected Information Enhancements:

First and foremost, the amendment protects certain personal information from release. The legislation 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; credit and debit card numbers; social security number; month and day of birth; driver license number; any telephone number; and any personal e-mail 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.

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- 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 which is deemed to provide a competitive advantage to bidders now expressly includes detailed or itemized cost estimates prepared prior to bid opening; and
- 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.

2. 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 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;

- Government records must be made available on a public website to the extent feasible; this may be done through a shared services agreement;
- 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 home page; the custodian must provide the requestor with directions to assist in finding the record on the website;
- A custodian is not required to complete a request, including for, but not limited to, mail, e-mail, text messages, correspondences, or social media postings and messages, if the request does not identify a specific job title or accounts to be searched, a specific subject matter, and is not confined to a reasonable time period, or 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 which include 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 which is already the subject of a discovery request in the proceeding;
- Requestors have fourteen business days to retrieve records once notified that they are available.

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 which do not call for a mandatory award.

Finally, a public agency may now receive 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.

3. 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:

- Review the entity's records request form and conform it to the form provided by the Government Records Council;
- Establish procedural safeguards to ensure that protected information is redacted from any records production; and
- Review public records which may feasibly be uploaded to a publicly available website. Some items which may be considered could include: meeting minutes, collective negotiations agreements, various other contracts and the approved budget.

SPSK's public sector attorneys stand ready to assist our clients in this complex area.

DISCLAIMER: This Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.