

# The New Jersey Open Public Records Act (OPRA)

## **What is OPRA?**

The *Open Public Records Act*, more commonly known as “OPRA,” is the New Jersey law that governs the public’s access to government records maintained by public agencies, including local governments. A sweeping revision to the prior public records law, it was approved on January 8, 2002 and became effective on July 8, 2002 (P.L. 2001, c. 404). The law affects every aspect of local government and affects how every municipality in the State conducts its business.

## **Legislative findings**

*N.J.S.A. 47:1A-1* contains the legislative findings.

The Legislature finds and declares it to be the public policy of this State that:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented; 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;

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; and nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

It is clear that the legislature intended OPRA to be as broad as possible. Indeed, all government records are public unless exempted. Exemptions can come from the following sources:

- statute
- a resolution from either or both houses of the legislature
- administrative regulations
- Executive Order of the Governor (or past Governor)
- Rules of Court
- Federal laws, regulations, or orders.

It is important to remember that unless one of these sources contains an exemption for a document, it is a public record and should be released.

## **Definitions**

*N.J.S.A. 47:1A-1.1* contains several important definitions as well as the statutory exceptions to OPRA.

A. “*Government 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. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.”

The definition is important because *only those materials deemed “government records” fall under OPRA*. Courts have found that “not every paper prepared by a public employee fits within the definition of a government record for purposes of the Open Public Records Act.” If the public employee or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a government record subject to production under the OPRA. For example, handwritten notes taken at a meeting of a public body are not government records.

This definition also contains an important exception to OPRA. Materials that are consultative or deliberative are not government records. In order to fall under this exception, the document must satisfy two aspects:

- it cannot contain only facts; it must have recommendations, opinions, or advice;
- it must be generated before any decisions on its subject were made.

B. “*Public agency*” means “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.”

This, too, is a broad definition, intended to encompass municipalities as well as the boards that serve municipalities, such as the planning, zoning, or environmental board.

## **Exemptions**

All government records as defined above are subject to public access unless specifically exempt under OPRA or another law. The most common exceptions are:

- criminal investigatory records;
- victims' records, except that a victim of a crime shall have access to the victim's own records;
- trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;
- any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the a-c privilege;
- administrative or technical information regarding computer hardware, software and networks

which, if disclosed, would jeopardize computer security;

- emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;
- information which, if disclosed, would give an advantage to competitors or bidders;
- information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position;
- information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;
- information which is to be kept confidential pursuant to court order;
- that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person; 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 New Jersey Motor Vehicle Commission 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.

There is one additional and often-overlooked exemption in the legislative findings. A public body has a responsibility to *safeguard a citizen's personal information* when disclosure of that information would violate that citizen's right to privacy. In *Burnett v. County of Bergen*, 198 N.J. 408, (2009), the New Jersey Supreme Court found that this was a substantive provision, and not just a toothless statement of policy. The Supreme Court developed a balancing test that a public body should consider when they believe that a record may violate a citizen's privacy rights. In deciding whether to redact a record or deny access altogether, the public body should examine:

- the type of record requested
- the information it does or might contain
- the potential for harm in any subsequent nonconsensual disclosure
- the injury from disclosure to the relationship in which the record was generated

- the adequacy of safeguards to prevent unauthorized disclosure
- the degree of need for access
- whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

## Additional Notes

### A. *Responding to OPRA requests*

1. The municipal clerk is the custodian of records.
2. The custodian must respond within 7 days, producing the record or a written response that states when the record will be available or specifying the exemption that applies.
3. The custodian can be fined for failure to comply with OPRA requirements.
4. Anyone who interferes with compliance can be fined.
5. The request must identify the record requested.
6. If the record requested does not exist, OPRA does not apply.
7. There is no requirement for the custodian to research or create a record in response to a request.
8. There is no exemption for records that might be embarrassing.

### B. *Agenda Materials*

Backup materials for the agenda (attached reports and referenced documents) are public records and must be made available. (Note: the backup materials are NOT part of the agenda but they must be made available.)

### C. *E-Mails*

1. Email is a document.
2. **Email on public business is a public record**, even if created on a personal computer.
3. **Emails are frequently requested and usually must be released.**

### D. *Text Messages*

The definition of government record has been interpreted to include text messages, as long as the text messages have been “made, maintained, or kept on file...or received in the course of ...official business.” In a recent case, however, the Government Records Council said that determination should not be construed to provide for unmitigated access to text message and that exemptions to disclosure may apply on a case-by-case basis. *Verry v. Franklin Fire District No. 1 (Somerset)*, GRC No. 2014-387 (2015).

### E. *Record Retention Requirements*

Specified by the New Jersey Division of Archives and Records Management ([see www.nj.gov/state/darm](http://www.nj.gov/state/darm)) to access the Records Retention Schedule for municipal agencies and the Uniform Electronic Transactions Act (UETA).

### F. *Common law right to know*

The “common law” right of access to a public record is unaffected by OPRA; the common law and the statute are independent of each other and many requests now include reference to both laws. To determine whether the record must be released under common law, courts have applied a balancing test between the public’s right to know and the need for confidentiality.

*(Excerpted from N.J. State League of Municipalities Resources and GRC/Court Decisions)*