

Updates: Open Public Records Act (OPRA) N.J.S.A. 47:1A-1 et seq.



BURLINGTON COUNTY
MUNICIPAL JOINT INSURANCE FUND (BURLCOJIF)
Annual Retreat: April 18th, 2023

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OPRA Requests Seeking Claims Information

- Municipal Clerks that receive an OPRA request seeking documents pertaining to an ongoing or closed lawsuit or requesting other claims information, should follow the recommended procedures set forth in the OPRA Policy regarding Requests for Inspection and Copying of Documents which was adopted by the BURLCOJIF on November 23, 2021.

BURLCOJIF OPRA Policy

**A copy of the Policy which was adopted on November 23, 2021 by the BURLCOJIF and the OPRA Request Roadmap are included in your Retreat Binder.*



- Upon receipt of an OPRA Request seeking documents related to the Fund, whether administrative or claim/litigation related, the request should be immediately and carefully reviewed by the Municipal Clerk of the Member Municipality.
- The Member Municipality should immediately determine which documents are in their possession. Any documents in the possession of the Member that are identified to be responsive to the OPRA Request should be reviewed by the Municipal Solicitor prior to their release, and all redactions should be performed.
- All Complaints that were filed against a Member should be in the possession of the Municipal Clerk.
- All Settlement Agreements and Releases should also be in the possession of the Municipal Clerk.

BURLCOJIF OPRA Policy cont.

- An Administrative procedure was established by the Fund Administrator and the Fund Solicitor whereby, the Qual-Lynx General Liability Supervisor, will forward to the Member, at the conclusion of each case, copies of the following documents:
Complaint, Settlement Agreement/Release, Stipulation of Dismissal & Proof of any settlement payment.
- Upon the receipt of this information from Qual-Lynx, the Member should maintain the documents in the case file (either paper or electronic).
- If there are any documents that are responsive to the OPRA request that are determined not to be in the possession of the Member, and it is believed that the documents are in the possession of the Fund, then the OPRA request should be immediately forwarded to the Fund Administrator, Kris Kristie, with a request for the specific documents that are not in the Member's possession.

BURLCOJIF OPRA Policy cont.

- The appropriate Fund Professional shall then attempt to retrieve the documents that are responsive to the request from their records and/or the records of other Fund Professionals. Once the appropriate Fund Professional retrieves responsive documents, the documents will be provided to the Fund Solicitor for review and approval as to the release of the documents.
- All documents that are approved for Release by the Fund Solicitor shall be forwarded by the Fund Professional to the Member.



How much time do you have to respond to an OPRA request?:

Custodians should respond to an OPRA request as soon as possible but not later than seven (7) business days after the request is received, provided that the record is currently available and not in storage or archived.

Day One (1) is the day following the Custodian's receipt of the request.

The Custodian's response must provide one of the following:

- ❖ grant access to the records sought; or
- ❖ deny access to the records sought; or
- ❖ Request clarification of the request; or
- ❖ Request an extension of time to fulfill the request.



Are there records that are subject to immediate release?

OPRA requires that custodians must ordinarily grant immediate access to budgets, bills, vouchers, contracts and public employee salary and overtime information.

❖ “Immediate access” means, at once, without delay.

Exceptions may include instances in which the requested records are in use, in storage or require medium conversion.

If a custodian cannot provide immediate access to records for a legitimate reason, the custodian must immediately provide such reason in writing to the requestor and notify the requestor of the anticipated deadline date upon which the records will be provided.



Additional Time Required

Custodians may seek extensions of time beyond the seven (7) business day deadline with legitimate reasons (records in storage, media conversion required, requests voluminous, etc.).

Requests must be in writing, within seven (7) business days, and provide an anticipated date upon which the records will be provided.

Failure to grant or deny access by the extended deadline date results in a “deemed” denial.

(N.J.S.A. 47:1A-5.1)



Special Service Charge

- Special service charges for “extraordinary” requests must be warranted and reasonable and based on actual direct cost. N.J.S.A. 47:1A5(c).
- Actual direct cost means hourly rate of lowest level employee capable of fulfilling request (no fringe benefits).
- Only warranted when:
 - Copies cannot be reproduced by ordinary copying equipment in ordinary business size.
 - Accommodating request involves an extraordinary expenditure of time and effort.



Special Service Charge cont.

- Labor fee for extraordinary/voluminous requests.
- The charge must be estimated in advance, prior to the charge being incurred.
- Important! – the requestor must agree to pay.
- An agency cannot just incur the charge, invoice the requestor, and then send him to the collections agency if he fails to pay.
- Case-by-case determination.
- Flat Rates? Carluccio v. N.J. Dep't of Env'tl. Prot., GRC 2008-10.
- An ordinance is problematic.
- There is a 14-point analysis to determine whether a special service charge is appropriate:
(www.nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf).

Overly Broad and Invalid Requests

- An OPRA request is invalid when it fails to identify with reasonable clarity the specific government records sought.
- The validity of an OPRA request typically falls into 3 categories:
 - 1. “Any and all” requests seeking “records” generically, etc. and requiring a custodian to conduct research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).
 - 2. Requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).
 - 3. Requests that are either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).



Overly Broad and Invalid Request Examples

- Overly Broad: “any and all records connected to the construction of the new municipal building.”
- Valid: “For the period from January 1, 2020, to April 1, 2023, any and all e-mails between Jane Doe and John Smith regarding the plumbing contract for the municipal building.”
- Research: “all meeting minutes from 2020 in which the Town Council discussed ABC Towing Company.”
- Search: “all Town Council meeting minutes from calendar year 2020.”

Be careful, though:

- The Court held that a request seeking “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present” was valid. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).
- Paff v. Galloway, 229 N.J. 340 (2017), where a requestor asked for an e-mail log showing the sender, recipient, date, and subject matter of e-mails of certain employees over a specific period of time. In reversing the Appellate Division, the Supreme Court rejected the agency’s position, essentially contending that producing the e-mail log did not amount to creating a new record.



Certain Timing Issues

Practice Tips:

- Date stamp every OPRA request immediately upon receipt.
- Create an OPRA log for internal tracking and set the calendar.
- If a request is complex or requires many redactions, send it to your attorney as soon as possible.
- Consider, and discuss with your attorney, denying improper portions of requests instead of asking for clarification.



Options to Challenge a Denial of Access

- Requestors may:
 - File a Complaint in Superior Court, or
 - File a Complaint with the GRC, but
 - NOT BOTH!
- In Superior Court, a Complaint must be filed within 45 days of denial of access (Mason v. City of Hoboken, 196 NJ 51 (2008)).
- There is no statute of limitations to file a Denial of Access Complaint with the GRC.

GRC Complaint Process

- Step One: Denial of Access Complaint
- Step Two: Mediation (optional, but must be in good faith)
- Step Three: Adjudication
- Step Four (if desired): Appeal to Appellate Division of the Superior Court of New Jersey.
- See GRC Regulations for details regarding each step.



Prevailing Party Attorney's Fees

- N.J.S.A. 47:1A-6 and 7.f.
- Teeters v. DYFS; 387 N.J. Super. 423 (App. Div. 2006).
 - A complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Also, when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed, the requestor is a “prevailing party”.



Prevailing Party Attorney's Fees cont.

- Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).
 - A Complainant is a “prevailing party” if he/she can demonstrate:
 - 1. a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved; and\
 - 2. that the relief ultimately secured by plaintiffs had a basis in law.



Knowing and Willful Penalty

- A public official, officer, employee or custodian who knowingly and willfully violates OPRA and unreasonably denies access under the totality of the circumstances is assessed a monetary penalty.
 - \$1,000.00 for initial violation.
 - \$2,500.00 for second violation within 10 years of initial violations.
 - \$5,000.00 for third violation within 10 years of initial violation.
- The GRC position is that the penalty is paid personally by the individual found in violation, not by the public agency.



Knowing and Willful Penalty cont.

- Knowing and willful = a high standard
- The GRC has issued 8 knowing and willful fines to 5 different custodians (the GRC has actually issued 9 penalties, but the Appellate Division reversed 1).
 - *1 of the 5 custodians has been fined 3 times in 10 years.
- The Courts can also impose a fine, N.Jersey Media Grp. V. State Office of the Governor, 451 N.J. Super. 282 (App. Div. 2017).

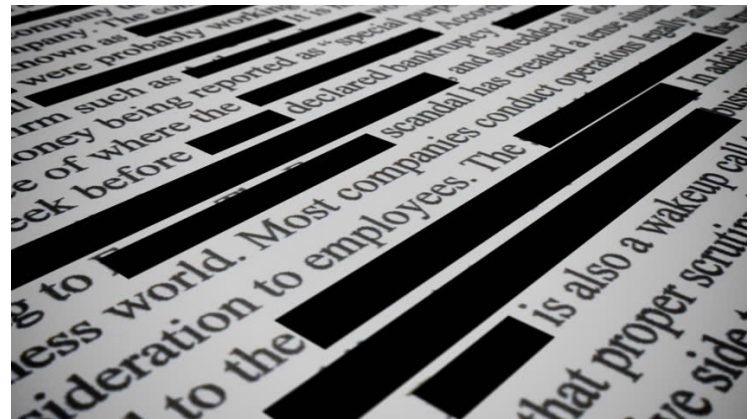
Redacting Government Records:

Under OPRA, a government record that is otherwise publicly accessible may contain information which should not be disclosed and thus redacted.

Redaction means editing a record to prevent public viewing of material that should not be disclosed.

Personal identifiers such as, home address, telephone numbers, social security numbers, date of birth, etc., are examples of information to be redacted.

When redactions are made, the custodian must explain the reason for the redaction and the custodian has the responsibility to provide a reasonable explanation. These explanations are to be provided in a Vaughn index (also known as a privilege log).



Requests for Communications

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them:

- In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007).
- The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Edu. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).
- The GRC notes that the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. See Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).
- The Council has also found that an OPRA request not containing a sender and/or recipient is invalid. See Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018).

Body Worn Cameras (BWC)

The New Jersey Legislature mandated universal Body Worn Camera (BWC) implementation with the passage of P.L. 2020, c. 128 and 129. These two laws require the use of BWC by all “uniformed patrol officers” in the course of their duties, and provide the basic framework for the operation of BWCs and the handling of BWC footage. Attorney General Guidelines were issued and they became effective on June 1, 2021.

While many departments in New Jersey had already been deploying BWCs on a routine basis, these laws have ushered in a rapid expansion of BWC use across the State, both in who will be required to wear a BWC and under what circumstances.



Retention of BWC Recordings:

A BWC Recording shall be retained by the law enforcement agency for not less than 180 days from the date it was recorded.

A BWC Recording shall automatically be retained for not less than three (3) years if it captures images involving an encounter about which a complaint has been registered by a subject of the BWC Recording.

A BWC Recording shall also be retained for not less than three (3) years if voluntarily requested by:

- a) A law enforcement officer who made the recording;
- b) A law enforcement officer who is a subject in the recording;
- c) An Immediate Supervisor of the law enforcement officer who made the recording;
- d) Any law enforcement officer, if the BWC recording is being retained solely and exclusively for police training purposes;
- e) Any member of the public who is a subject of a BWC recording;
- f) Any parent or guardian of a minor who is a subject of the BWC recording;
- g) A deceased subjects' next of kin or legally authorized designee.



Public Disclosure of BWC Recordings:

Any agency receiving a subpoena, court order, or request pursuant to the Open Public Records Act, or the common law right to know, for a BWC recording shall, within one business day of receipt of such subpoena, court order, or request, and before complying with it, provide notice to the County Prosecutor. Such notice shall state clearly the deadline by which a response must be made.



Body Worn Camera Violations:



If a law enforcement officer, employee, or agent fails to adhere to the recording or retention requirements contained in this Policy, intentionally interferes with a BWC's ability to accurately capture audio or video recordings, or violates any other provision of this policy, the officer, employee, or agent shall be subject to appropriate disciplinary action, in addition to any judicial consequences outlined in the law.

Non-OPRA Requests

- Not all record requests are OPRA requests!
- OPRA does not affect common law right of access, or right of access via discovery.
- Challenges to common law requests and discovery requests must be made to the Superior Court of New Jersey; not the Government Records Council (GRC).
- GRC cannot advise on process, fees, etc. regarding common law or discovery requests.

An Update regarding the Production of Internal Affairs Records After the Supreme Court's Decision in *Rivera v. Union County Prosecutor's Office*

The New Jersey Supreme Court decided the case *Rivera v. Union County Prosecutor's Office*, which dramatically altered the way in which Police Departments will have to respond to requests for IA reports. And, subsequently, the Appellate Division issued an opinion in *Salvero v. City of Elizabeth*, which applied the Rivera analysis to subpoenas for IA records. It is anticipated that police departments around the State may receive the same or similar requests for IA records.

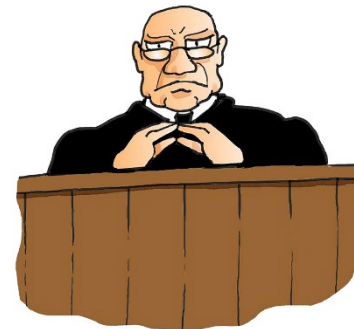


Rivera Decision

The New Jersey Supreme Court held that while OPRA does not permit access to internal affairs reports, those records can and should be disclosed under the common law right of access – subject to appropriate redactions -- when interests that favor disclosure outweigh concerns for confidentiality. The Court's holding required the internal affairs report to be disclosed under the common law after the trial court reviews it and redacts parts that raise legitimate confidentiality concerns.

Practically speaking, this decision requires the trial judge to :

- (1) Review the internal affairs report; and
- (2) Complete the necessary balancing test; and
- (3) Enter an order of disclosure with any necessary redactions. The Court provided guidance on how to conduct the balancing test, which departments now will be required to undertake upon receiving similar requests.



Rivera Decision IA Reports vs. IA Files

However, in a footnote, the Court addressed an important distinction between IA reports and IA files which may prove critical for projecting the impact of the *Rivera* decision on future IA records requests.

Thus, it is IA reports, and not the entire IA files, which are subject to disclosure under the common law analysis.



OPRA vs. Common Law

While the definition of what constitutes a public record under the common law is broader than OPRA, it is also more difficult to obtain a public record under the common law than it is pursuant to OPRA. Indeed, in order to obtain records under "this broader class of materials, [a] requestor must make a greater showing than OPRA requires. This entails the requestor showing that:

- (1) The person seeking access must establish an interest in the subject matter of the material'; and
- (2) The [person's] right to access must be balanced against the State's interest in preventing disclosure.

As a result, the requisite showing to obtain a public record under the common law requires a balancing of the State's interest in preventing disclosure (the need for confidentiality factors) against the public's level of interest (the importance of transparency factors).

Subpoenas

Salvero v. City of Elizabeth

After the Supreme Court issued their decision in *Rivera*, the Appellate Division decided *Salvero v. City of Elizabeth*, which applied *Rivera*'s common law disclosure analysis to a determination of whether IA records should be released upon receipt of a subpoena. It should be noted that the records request at issue in *Salvero* was for the IA file, which is broader than the request for the IA report at issue in *Rivera*, as discussed above.

The Appellate Division opinion relies heavily upon *Rivera*, and applies the *Rivera* analysis to a subpoena for IA records, which is a broader request than the one for the IA report sought in *Rivera*.



Guidance

In light of the *Rivera* and *Salvero* decisions, IA reports and records are subject to disclosure under the common law and pursuant to subpoena when the balancing of factors in favor of confidentiality is outweighed by the factors in favor of transparency.

Managing these requests will be extremely difficult for many police departments, as there will need to be a common law analysis performed each time an IA records request comes in, which likely will need to be articulated in the response. Responses to these requests will require a records custodian to present more detailed objections in order to allow a reviewing court to conduct the interest balancing test. If a request is made only under OPRA, *Rivera* holds that the report need not be produced, as the OPRA exclusion still applies. However, there is little reason to think that records requestors will not see the *Rivera* decision and begin making requests for IA documents under the common law.

*Consult with your Municipal Attorney and/or Labor Counsel when determining how to respond to these requests.



QUESTIONS / DISCUSSION

