

New Jersey State League of Municipalities

Frequently Asked Questions Regarding Access to Government Records

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This information has been prepared by the League General Counsel as a supplement to the seminars that have been presented by the League on the Open Public Records Act and as a service to municipal officials who have contacted the League with questions on the application of the law. The questions and responses are general in nature and this document does not constitute legal advice which can only be provided on the basis of the specific circumstances which might arise. Municipal officials seeking specific legal advice should consult with their municipal attorney. Others persons seeking specific legal advice should consult with their personal attorney.

Q When discussing access to government records, I have seen reference to OPRA (Open Public Records Act); RTK (Right to Know Law); as well as the Access to Public Records Law and the Common Law Right to Know. What is the difference between them?

A The official title of P.L. 2001, Ch. 404 is “An Act concerning public access to government records, amending and supplementing P.L.1963, c.73 (C.47:1A-1 et seq.) , amending P.L.1995, c.23 and P.L.1998, c.17, establishing a Privacy Study Commission and making an appropriation for the expenses thereof, and repealing parts of the statutory law.” which is very unwieldy for everyday reference. As a convenient shorthand, various State government departments have been referring to the new law as OPRA, the Open Public Records Act. That designation has been used as a convenient shorthand and follows the same pattern as the OPMA (Open Public Meetings Act). The former statutory provisions were generally referred to as the Right to Know Law, but that designation became confusing when another “Right to Know” law was adopted which focused on disclosure of hazardous substances in the workplace. The OPRA designation avoids that confusion. The Common Law Right to Know is the body of law which has developed as the result of judicial decisions on public access to government records. That body of law continues in effect as OPRA specifically preserves the Common Law Right to Know.

Q Does the new law mean that anyone can get access to the personnel files of public employees?

A No. Personnel files and pension records of any individual, including records of grievances filed by or against an individual, are not classified as public records and shall not be made available, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record. In addition, Executive Order 21, issued by Governor James E. McGreevey on July 8, 2002, exempts from public disclosure the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing, and thereafter in the case of unsuccessful candidates.

- Q Under the public records law, can anyone come in and get copies of birth and marriage certificates?**
- A No. Under Executive Order No. 18, which was issued by Governor James E. McGreevey on April 24, 2002, a State or local Registrar may issue a certified copy of a vital record only to persons who establish themselves as the subject of the vital record, the subject's parent, legal guardian or legal representative, spouse, child, grandchild or sibling and the Registrar is required to authenticate the identity of the requestor and his or her relationship with the subject of the vital record. Additional regulations are expected to be issued by the Commissioner of the Department of Health and Senior Services to define who may obtain copies of those vital records. The Executive Order was issued in response to recommendations from the New Jersey Domestic Security Preparedness Task Force.
- Q A citizen has asked for copies of all minutes of the governing body and the Planning Board where there was any discussion of a particular development. That project was under off and on discussion for over 5 years and the only way that I could determine the meetings at which it was discussed would be to go and read all of the minutes for those years. Do I have to do that research?**
- A No. The new law is intended to provide access to government records that have been specifically identified and requested. It does not require that the Custodian of Records become a researcher for the person making the request. The requestor needs to identify the record which is being requested and the Custodian of Records needs to provide access to that specific record, unless it is exempted under the provisions of the law.
- Q A public library is a governmental entity. Does the new public records law mean that I can review the records of my neighbor and find out what books and videotapes my neighbor is borrowing?**
- A No. Library records which contain the names or other personally identifying details regarding the users of libraries are confidential and shall not be disclosed except where necessary for the proper operation of the library or where disclosure is requested by the user; or disclosure is required pursuant to a subpoena issued by a court or a court order. *N.J.S. 18A:73-43.2*
- Q Our municipality has adopted an ordinance which establishes a fee of \$10 for copies of police accident reports. Is that fee permissible since it was adopted by ordinance.**
- A No. That fee was invalid before the adoption of the new Access to Public Records Law. Under the provisions of *N.J.S.A. 39:4-131* written reports required to be forwarded by law enforcement officers and the information contained therein shall not be privileged or held confidential. Every citizen of this State shall have the right, during regular business hours and under supervision, to inspect and copy such reports and shall also have the right in person to purchase copies of the reports at the same fee established by section 2 of P.L.1963, c. 73 (C.47:1A-2). Those are the fees which remain in effect under the Access to Public Records Law and begin at \$.75 per page and drop down to \$.25 per page, based on the number of pages copied. If copies of reports are requested other than in person, an additional fee of up to \$5.00 for the first three pages and \$1.00 per page thereafter may be added to cover the administrative costs of the report. Under the specific provisions of *N.J.S.A. 39:4-131.1*, any rule, regulation, resolution or ordinance inconsistent with that statute or establishing a fee in excess of the fee permitted by section 2 of P.L.1963, c. 73 (C. 47:1A-2) is superseded insofar as it is inconsistent or to the extent that it exceeds the fee so established. That has been the law since February, 1980.

Q Does the new law change the requirements on access to records involving juveniles?

A No. The new law specifically provides that records that are confidential under any other statute, executive order, regulation, court rule or court order remain confidential. Social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection. The statute provides for limited availability to official agencies and by court order. *N.J.S. 2A:4A-60*. Proceedings before the Juvenile Conference Committee appointed by the Court in each county or in a municipality are also confidential. *N.J.S. 2A:4A-75*.

Q What about records of domestic violence complaints:

A Various statutes require that information the victims of sexual abuse or assault, including any report, statement, photograph, court document, complaint or any other public record which states the name, address and identity of a victim shall be confidential and unavailable to the public. *N.J.S. 2A:61B-1* and *N.J.S. 2A:82-46*. Applications for relief under the Prevention of Domestic Violence Act are confidential. *N.J.S. 2C:25-33*.

Q Is all of the information, such as information on the property record card, information on senior citizens or veterans, maintained by the Tax Assessor a public record?

A Much of that information is provided to the Tax Assessor by individuals who expect their personal privacy to be respected. Under the provisions of Executive Order 21, issued by Governor James E. McGreevey on July 8, 2002, the regulations proposed by the various State Executive Departments became immediately effective until the public comment period concluded and final action is taken on those proposed regulations. Among the regulations proposed by the New Jersey Department of the Treasury are provisions that the following data is confidential and shall not be disclosed: Income and expense information provided to municipal tax assessors pursuant to *N.J.S.A. 54:4-34*; appraisals of real property prepared in connection with tax appeals, which have not been admitted into evidence before a County Board of Taxation or the Tax Court; income, expense and other financial information contained on local property tax record cards, on computer assisted mass appraisal (CAMA) systems, and on applications, statements and supporting documentation for deductions, exemptions and farmland assessments; personal information such as age, medical condition/disability, and veteran status, reflected on applications and statements submitted in support of eligibility for local property tax exemptions and deductions, and supporting documentation, such as proofs of age, death, medical condition/disability and veteran status, submitted in support of such applications or statements. Those records are confidential under Executive Order 21 and, if the proposed regulation is adopted will continue to be treated as confidential.

Q I am the Zoning Officer for my municipality and have exchanged e-mail messages with a business in the municipality on various issues relating to expanding their place of business. Are those e-mail messages public records?

A While the statute does not specifically mention e-mail messages, the experience in other States with broad open public records laws shows a pattern of treating e-mail messages in the same manner as letters and other correspondence. In that case, they would be public records, unless they fall within some specific exemption. In practice a distinction has been made between personal e-mail messages and the messages which discuss public business or are used to transmit documents which would otherwise be public.

Q I am the municipal Administrator and a citizen has asked for my budget notes and my draft budget even before I provide my recommendations to the governing body. Do I have to provide that information and, if so, when?

A You do not have to provide that raw information. That would fall under the specific exemption for inter-agency or intra-agency advisory, consultative, or deliberative material which is not a public record under the law.

Q What impact does the new law have on access to police records and investigatory reports?

A The new law does not make any significant changes with regard to the records of law enforcement agencies. Generally, records maintained by a law enforcement agency that are not required by law to be made and which pertain to a criminal investigation or related civil enforcement proceeding are not public records. As with most other exceptions, however, there are exceptions to the exceptions and the language of the statute, regulations issued by the Department of Law and Public Safety and Executive Orders issued by the Governor should be carefully reviewed with respect to any specific request for access to records.

Q We have some of our records in a database which was developed for municipal use. Someone has asked for the data in the database and wants it in electronic format. While we can copy the data to a disk, they will not be able to use it without the software that operates the database. Do we have to provide them with a copy of the software so that they can read the data?

A Absolutely not. That software is proprietary and is protected by copyright. You may not provide that software without violating the rights of the copyright holder. It may be possible, however, for you to provide the data in a generic format that the requestor could access with some other software program. However, you have to be very cautious that you do not provide information in the database which is otherwise confidential, such as social security numbers, driver's license numbers, credit card numbers, unlisted telephone numbers, home addresses and home telephone numbers. It would be dangerous to simply copy the database and provide it to the requestor without deleting the confidential information. With respect to requests for data in electronic format it will be important to discuss the means by which the data can be provided with your information technology consultant to make certain that you respond with the information that is public, but do not provide information that is private or confidential.

Q I have read the new law several times and I think that it is confusing. What do I do if I think that a particular document being requested may fall under one of the exceptions?

A As with any new law, there will be circumstances where people will have good faith disagreements over the application of the law. The first step to attempting to resolve that disagreement would be to consult with the municipal attorney who would ultimately have to defend any decision to treat a government record as a confidential record. If access to the requested document is denied, the requestor will have the option of appealing to the New Jersey Superior Court or to the newly established Government Records Council. Unfortunately, the Government Records Council has not yet been appointed and the procedures for an appeal to the Government Records Council have not been established.

Q Are there going to be more exceptions to the classification of a government record as a public record?

A There will be most certainly be more exceptions which will be established either by other laws, by Executive Orders issued by the Governor or by regulations adopted by the various State agencies. That has been the experience in other states with broad access to public records statutes. It will be important to be aware of those new statutes, executive orders and regulations as they are adopted. On July 1, 2002, every Executive Department issued proposed regulations addressing access to records and providing that certain records are confidential and are not public records. The comment period runs until August 30, 2002, after which action will be taken to adopt regulations which may be modified as a result of the comments received. All of those regulations were implemented by Executive Order 21, on a temporary basis, until final action is taken on the proposed regulations.

Q Is all of the information included in a license or permit application available to the public under the new law?

A No, applications for various types of licenses will be presumed confidential, to encourage openness and candor by applicants. Among the information which would be treated as confidential would be applications for and police investigations regarding firearms permits, casino licenses, private detective licenses, alcoholic beverage licenses, hazardous waste licenses, etc. Additionally, Executive Order 21 specifically provides that a public governmental agency has the responsibility and the obligation to safeguard from public access a citizen's personal information with which it has been entrusted, and that an individual's home address and home telephone number, as well as his or her social security number, shall not be disclosed by a public agency at any level of government to anyone other than a person duly authorized by this State or the United States, except as otherwise provided by law, when essential to the performance of official duties, or when authorized by a person in interest.

Q I understand that attorney-client communications are privileged under the statute. Are there other communications which are considered to be privileged and would remain confidential?

A Yes. Communications between a psychologist and the patient are confidential under *N.J.S.A. 45-14B-28*. Communications between a cleric and a penitent are confidential under *N.J.S.A. 2A: 84-A-23*.

Q Since the mediator in public labor disputes are appointed by a public agency, the Public Employment Relations Commission, are their files, correspondence, notes and research public records that are available on request?

A No. Records of a mediator are confidential under the regulations adopted by the Public Employment Relations Commission. *N.J.A.C. 19:12-3.4*.

Q The new law provides an exception for "information that would give an advantage to competitors or bidders." Who decides whether the exception applies to a particular set of information.

A The determination would have to be made at the outset by the municipality and probably by the municipal attorney using a reasonableness standard and based on advice from its professionals, depending on the nature of the bid project (engineer, special consultant, etc.) The easiest example is where you are about to go out to bid on a project and you have the estimates provided by your engineer or other professional. Knowing what you expect the project to cost will give an advantage to a bidder. On the other hand, you could not hold

back information on underground conditions which might significantly impact the amount of work required on a project.

Q After the rejection of the first round of bids, does a contracting unit have to make the estimates available to the general public?

A. No. The estimates would still require some confidentiality as the contracting unit might be going out for new bids based on the estimates or might be going out for modified bids. The information in the estimates would give someone who had the estimates an unfair advantage in the bidding process.

Q If a contracting unit decides to abandon a project or has rejected bids on two separate occasions are the bid documents as well as the estimates public?

A The bid specifications are public documents as soon as they are issued, so it would not matter whether a project is abandoned or not. Anyone who requests access to the specifications would be able to see them. In a similar manner, the bids packages submitted by a bidder are public documents, except as to information that is otherwise treated as confidential, such as proprietary and financial data on the bidder. The bid estimates prepared for the contracting unit would probably no longer be entitled to confidentiality if a project is truly abandoned. However, just because the bids have been rejected twice does not mean that a project is abandoned, since the project might be simply postponed until circumstances were deemed better for the bidding process or might be slightly modified to address a particular aspect of the project that has a high cost. In that case, the estimates might still provide an unfair advantage to a prospective bidder and would be entitled to confidentiality. The decision would have to be based on the specific circumstances of the particular project.

Q Are the records of the Municipal Court subject to access through the Municipal Clerk as the Custodian of Records?

A No. The records of the Municipal Court are under the jurisdiction of the judiciary and access is governed by the Rules promulgated by the New Jersey Supreme Court. The Legislature, in enacting OPRA, included specific language acknowledging the separate governing structure for the judiciary and provided in N.J.S.A. 47:1A-12 that "The New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes of this act." Additionally, N.J.S.A. 47:18-9 clearly incorporates exemptions of records from public access pursuant to other statutes, Executive Orders, Rules of Court, and judicial case law.

Q The law requires that "immediate" access must be provided for certain records, such as budgets, bills, vouchers, contracts and employee salary and overtime information. Is there any guidance as to what is meant by immediate? Does that mean that we have to drop everything to provide that information instantly?

A The term "immediate" should generally be read as right away. It is clearly different from the response time provided for other records requests. It also assumes that the record requested is reasonably available so that it can be provided immediately. If someone asks to see the particular contract that was just authorized by the governing body, it should not present any difficulty in making that document available. If, on the other hand, someone has requested a copy of a contract from several years ago, it might not be readily available, but an effort should be made to provide it as promptly as possible and without undue delay. One easy way to anticipate those requests would be to have copies of the documents for which immediate access is to be provided in a notebook which can be made available and

with any information which is confidential or excepted from the public access rules excised from the document. That process would reduce the burden on the Custodian of Records who might otherwise have to be with the person reviewing the record. The use of copies will serve both the purpose of public access and will reduce the burden on the Custodian.

Q While I know that a municipality's legal bills are public records, to what extent can a municipality deny a request if an individual asks for ALL legal bills submitted to the City within the last year. My problem is that the requester does not want to narrow this broad and vague request. Does this mean that I now have to go through all the City's legal bills and redact all privileged information for the last year in order to comply with this request? Just trying to locate all paid bills will take days. The requester does not want to even narrow his request to a particular project.

A If they have sufficiently identified the document that you can identify it, then that should be enough. Asking for all of the vouchers is easy to identify. If they asked for all vouchers in which there were charges for conferences with the Town Administrator, that would not be sufficient identification and would require substantial research. You do not become the research agent for the person requesting copies of documents. As for having to excise confidential data, you may be using too broad a concept of what is privileged. Certainly the date, time, and what was done are not confidential. Bills should not be used as memoranda to a file and just because work is done by an attorney does not automatically make the billing record of that work attorney-client privileged. One of the purposes of the new law is precisely so that people can get access to billings and contracts and to be able to see what work is performed for the funds being expended.

Q Under the provisions of OPRA, someone who is denied access to a government record can appeal the denial to the Government Records Council. How is that appeal handled?

A The procedure for an appeal is established by the Government Records Council (GRC) and information can be obtained on the GRC web site, <http://www.nj.gov/grc/>. In addition, the GRC has announced that their *Public Guide to ORPA* and the *Denial Appeal's poster* is now available on their website and can be downloaded. The link for the *Public Guide to OPRA* is <http://www.nj.gov/grc/publicflyer.pdf> and the link for the *Denial Appeal's poster* is <http://www.nj.gov/grc/denialappealposter.pdf>. The toll-free telephone number for the GRC is 866-850-0511.

Q I have not found anything specific in OPRA which says that someone can file an anonymous request, but there is language that says that if someone submits an anonymous request the Custodian of Records can require a deposit if the cost of the copies would exceed \$5.00. Does that mean that someone can submit an anonymous request.

A No. In order to understand the apparent inconsistent language in the statute, it is necessary to review some of the legislative history as the law worked its way through the legislative process. Initially, the language allowing the anonymous request was in Section 6 f and said "but the requestor shall have the option to not provide a name, address, or phone number." That was in the portion of that section where the access to records request form was described. At the last revision of the legislation, on January 3, 2002, that language was deleted from the legislation. Unfortunately, the drafters did not delete the reference to an anonymous request when the section referred to the ability to require a deposit. Since the legislature deleted the ability to file a form in an anonymous manner, the conclusion is that the request cannot be submitted anonymously. The next logical conclusion is that the ability to require a deposit where the cost of copying exceeds \$5.00 is not limited and would be permissible in any circumstance where the cost of copying would exceed the

\$5.00. That is the rational approach, since to read it otherwise would mean that the Custodian of Records would be in a position of not being able to require a deposit where the cost of copying would be substantial. That could lead to abuse by anyone who sought to harass the Custodian of Records with requests for copies and then to decide that they did not want the copies after the municipality had incurred the expense to make the copies.

Q The draft form for access to records includes a disclaimer about the requestor not having been convicted of a crime. Does that mean that someone who has been convicted cannot have access to any records?

A No. That disclaimer applies only to a specific provision in OPRA. The language in the disclaimer says:

The applicant hereby certifies that he or she has not been convicted of any indictable offense under the laws of this State, any other state or the United States and is not seeking government records containing personal information pertaining to the victim or the victim's family as provided by N.J.S.A. 47:1A-1 et seq.

It is designed only to address the requirement in the statute that the Custodian of Records is not to provide information on a victim or a victim's family to a person who has been convicted of an indictable offense. Unfortunately that requirement in the statute is almost impossible to administer since the Custodian of Records would have no easy way to find out whether a person requesting personal information (name, address, phone, etc.) on another individual was seeking it for any improper reason or had been convicted of an indictable offense. The disclaimer is simply an effort to give the Custodian as much protection as possible, under the circumstances. The disclaimer has no bearing on someone who is seeking copies of an ordinance or resolution or the many other items of government records which do not reveal personal information on an individual. To a considerable extent, the problem regarding disclosure of personal information has been addressed by Executive Order 21 which bars the disclosure of the home address and telephone number of an individual.