

# New Jersey's Open Public Records Law

by

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After many years of discussion and after many amendments to the proposed legislation, a new law was approved by the Legislature and signed into law by the Acting Governor on January 8, 2002, as P.L. 2001, c. 404 which makes significant changes in the the law governing public records.

Just as New Jersey has an Open Public Meetings Law (OPML) it now has an equivalent law dealing with the opening of public records and setting the standards by which the public can see those records. Referred to, for convenience, as the Open Public Records Act (OPRA), to avoid confusion with the "Right to Know Law" which governs disclosure of hazardous chemicals, the law follows the pattern of the Open Public Meetings Law in that it declares the records to be public unless they fall within certain exceptions.

The changes are significant and will require local officials to reconsider the approaches to public records and the means by which those records are made available to the public.

The most significant revision is that the Municipal Clerk is designated as the Custodian of Records, so that the requests for records will be submitted to the Clerk and the Clerk will be responsible for responding to the request. That change will require most municipalities to develop an internal system for cooperation so that when a document is requested that is in the possession of a specific Department (Police, Land Use, Public Works, Finance, etc.) there will be a responsibility for the Department to respond to the Clerk in a timely manner so that the Clerk may, in turn, respond to the applicant for the information within the seven (7) days required by P.L. 2001, c. 404, §6 i.

While in most cases the Municipal Clerk has been the actual custodian of many records, such as ordinances, resolutions, contracts, dog licenses, etc., under the new law the Municipal Clerk is the Custodian of all Municipal Records. That does not mean that all of the records must be physically transferred to the Clerk's office, nor does it mean that someone seeking a police accident report cannot go to the police department for the information, but it will require that the records request form be completed and that the time requirements be met and the Clerk will be responsible for meeting the provisions of the statute.

It must be noted that P.L. 2001, c. 404, §6 e requires **immediate access** ordinarily for "budgets, bills, vouchers, contracts, including collective negotiations agreements

and individual employment contracts, and public employee salary and overtime information.”

The Custodian of the Records is required by P.L. 2001, c. 4040, § 6 f to adopt a form to be used when applying for a copy of a record. A sample form is being developed by the League and will be available on the League’s web site, <http://www.njslom.org> for consideration by Municipal Clerks.

In order to understand the changes in the law as the result of the enactment of P.L. 2001, c. 404, which takes effect on July 8, 2002, it is necessary to understand the existing law and to do some comparison of the changes.

Under current law, the term public record applied to any record which was required by law to be made, maintained or kept on file was deemed to be a public record. The Statutory language provided that:

Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the "custodian" thereof) shall for the purposes of this act, be deemed to be public records.

In addition to the statutory provisions, there was what was referred to as the “Common Law Right-to-Know” which developed as the result of judicial decisions where the Court would weigh the reasons for making a record public against the reason for maintaining its confidentiality.

Under the body of case law, a number of records were not subject to public disclosure. While the body of judicial decisions have been preserved by P.L. 2001, c. 404, § 1 which excludes from the definition of public record :any record determined to be exempt by “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 ...” Although there is a general rule that existing case law is applicable, the provisions of P.L. 2001, c. 404 did make some specific revisions.

- Attorney bills, internally generated legal billing documents and legal submissions were are not subject to disclosure as public records under the old Right to Know Law since they are not explicitly required to be made, kept or maintained on file, however, they are common law public records because they are created by or at the request of public officers in the exercise of a public function. The common law

balancing test was applied to determine whether the attorney bills or internally generated legal billing documents should be disclosed. The basic rule was that the bills themselves were public records, but any information included in the bills that would breach the attorney-client confidentiality should be excised from the bill. The provisions of P.L. 2001, c. 404 clarify that provision by the language providing the exception for “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 attorney-client privilege;”

- Police reports and files regarding matters under investigation are specifically exempted from the definition of “public records,” however, if a record was a public record before the investigation commenced, it remains as a public record. For example, there might be an investigation over a specific contract and payments to a contractor. The fact of the investigation would not render the contract itself or the records of payments to be confidential, since they would have been public records before the investigation commenced.
- It was held by a Court that the Casino Control Commission did not have the authority to provide a newspaper with investigatory information and data about a license and registration applicants' criminal record, family and background. The information was confidential and could not be disclosed except upon the lawful order of a court of competent jurisdiction or on the authority of the attorney general to a duly authorized law enforcement agency. *Petition of Atlantic City Press Requesting Certain Files of the Casino Control Commission*, 277 N.J. Super. 433 (App.Div. 1994)
- Autopsy photographs were not required by law to be made and therefore did not constitute a public record subject to release under the decision in *Shuttleworth v. City of Camden*, 258 N.J. Super. 573 (App. Div. 1992). The provisions of P.L. 2001, c. 404, make that exemption specific:

any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner except: when used in a criminal action or proceeding in this State which relates to the death of that person, for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred, for use in the field of forensic pathology or for use in medical or scientific education or research, or for use by any law enforcement agency in this State or any other State or federal law enforcement agency;

Basically, the new law changes the standard from “records required to be made or maintained” to a standard where there is a presumption that a document is a public

record unless it falls within one of the exceptions set forth in P.L. 2001, c. 404 or some other statute, regulation, Executive Order or judicial decision.

If an applicant is denied a record, then they can appeal that decision to the Public Records Council which is established under the new law or to the New Jersey Superior Court. The burden will be on the Custodian of Records to demonstrate why the record should not be made available and the public agency may have to pay the attorney's fees for the applicant and civil penalties can be imposed between \$1,000 and \$5,000 for wilful violations of the law.

The statute recognizes that citizens have reasonable expectations of privacy

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

and the statute specifically provides an exemption for

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 Division of Motor Vehicles 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.

In addition, the concern over privacy is recognized by the establishment of a Privacy Study Commission which will be required to submit a report to the Legislature within 18 months on privacy related issues.

Other exceptions set forth in P.L. 2002, c. 404 include:

information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a

constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit;

any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members;

While those two exceptions appear to address privacy concerns, it should be noted that they apply only to members of the legislature and would not provide similar protection for any constituent who is corresponding with a Mayor, Governing Body Member, Municipal Manager, School Board Member, School Superintendent, or even the Governor, all of which might well include more personal information than a piece of correspondence to a Legislator. Those exceptions were inserted into the legislation in the final stage of consideration by the Assembly.

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 attorney-client 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; and

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 Division of Motor Vehicles 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.

A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential:

pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination;

records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;

valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access;

information contained on individual admission applications; and

information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student

With regard to the costs which may be charged for the copies, the statute sets the following maximum charges:

b. A copy or copies of a government record may be purchased any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section . If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

c. Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be

established in advance by ordinance . The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

One of the most significant changes requires tha the record be provided in the medium requested by the applicant:

d. A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

so that if you have the record in electronic format, then the applicant can have the record in the electronic format. Additionally, since the law requires that you convert the record to the medium requested, you may have to convert a document from your word processing program in to the word processing program requested by the applicant. Fortunately there are inexpensive programs which make conversion relatively easy.

While the changes in the law are significant and will require that both officials and the public understand the requirements and the procedures that are to be followed, the transition to the new law should not be especially difficult where there is an understanding of the law and cooperation among the various departments of local government so that responses can be provided in a timely manner.