

The Open Public Records Act

New Jersey Government Records Council



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What is OPRA?

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- New Jersey statute governing access to government records maintained by public agencies.
- Provides requestors with statutory **right** to access records.
- All limitations on access shall be construed in favor of the public.
- Again, it is the requestor's **right** to access records.

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When is OPRA used?

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- When the requestor chooses to invoke the statute.
- What does this mean?
 - Requestor chooses to submit an OPRA request (what constitutes a valid request is addressed in future slide).
 - Custodians do not decide when requestor must use OPRA.

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Are there other ways to request records?

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- Yes. OPRA is not the only way requestors can access records.
- What other request options exist?
 - Common law requests.
 - Discovery requests.
 - Administrative/Informal requests (example: requestor comes to Clerk's counter and verbally asks to review minute book).
- GRC can only provide guidance regarding OPRA requests.
- GRC cannot provide guidance regarding other types of records requests.

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Who can request records under OPRA?

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- Anyone!
- Although OPRA references "citizens of this State," the Attorney General's Office advises that OPRA does not prohibit access to residents of other states.
- A requestor may even file an OPRA request anonymously.

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What is an OPRA Request?

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- A request on official OPRA request form (either agency's form or GRC's Model Request Form).
- Written request (letter, fax, e-mail) that clearly references OPRA.
- If written request does not mention OPRA anywhere, it is not an OPRA request.
- Verbal requests are never OPRA requests.

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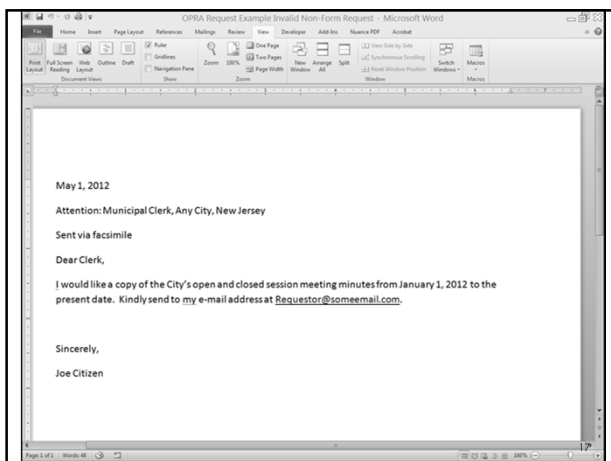
OPRA Request Example: Official Form

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OPRA Request Example: Invalid Non-Form Request

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OPRA Request Form Requirements

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- Every public agency is required to adopt an official OPRA request form.
- GRC's Model Request Form is available to download.
 - www.nj.gov/grc/custodians/request
- Agencies may create their own request form, but be careful not to include "misinformation."

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Statutory Form Requirements

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- Space for the name, address, and phone number of the requestor and brief description of the government record sought;
- Space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- Specific directions and procedures for requesting a record;
- A statement as to whether prepayment of fees or a deposit is required;

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- The time period within which the public agency is required to make the record available;
- A statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- Space for the custodian to list reasons if a request is denied in whole or in part;
- Space for the requestor to sign and date the form;
- Space for the custodian to sign and date the form if the request is fulfilled or denied.

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Let's Review

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- Who chooses when an OPRA request is submitted?
- Is OPRA the only way to request records?
- Can residents of other states request records under OPRA?
- Do all OPRA requests have to be on an official form?
- What is required of a non-form written request to be considered a valid OPRA request?
- Are verbal requests valid under OPRA?

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How Does a Requestor Submit an OPRA Request?

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- Requests can be hand delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.
- Agencies may limit submission options based on technological capabilities.
- Cannot impose an unreasonable obstacle for requestor!

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- Example: City of East Orange does not accept faxed OPRA requests, but accept all other methods.
 - This limitation does not present an unreasonable obstacle on the requestor.
- Example: XYZ agency only accepts hand delivered requests.
 - This presents an unreasonable obstacle on the requestor.
- Remember, all limitations on access shall be construed in favor of the public.

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What if an employee
other than the custodian
receives the OPRA
request?

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- Employee **must** do either of the following (employee chooses which option she prefers):
 1. Return the request to the requestor and direct requestor to proper custodian; or
 2. Accept the request and forward it to proper custodian.
- Every employee of an agency has an obligation under OPRA, not just custodian.

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What is a “government
record” under OPRA?

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- All records that are made, maintained, kept on file, or received in the course of official business.
 - Paper
 - Written or printed book
 - Document
 - Drawing
 - Map
 - Plan
 - Photograph
 - Microfilm
 - Data processed or image processed document

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- Information stored or maintained electronically
- Information stored or maintained by sound-recording or in a similar device
- Any copy of the above.

- This means everything! Not just records that are required to be maintained on file.

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What government records can a requestor access under OPRA?

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- Almost everything.
- 24 categories of records that are not accessible to the public (list is contained in Handbook for Records Custodians). If record does not fit into any category, it is subject to public access.
- Think: granting access is the RULE. Denying access is the EXCEPTION.
- A custodian's default mindset should be that everything can be disclosed.

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Who is the official
records custodian?

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- Municipality - the municipal clerk or other department head if made known to the public.
 - Example: many police departments name their own records custodian.
- Any other public agency - the officer officially designated by formal action of that agency's director or governing body, as the case may be.

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What is a “public agency” under OPRA?

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- Principal departments in Executive branch of State government, or any agency within or created by such department.
 - Examples: NJ Department of Community Affairs and NJ Government Records Council
- Legislature of the State and any agency within or created by Legislative Branch.
 - Example: Office of Legislative Services.

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- Any independent State authority, commission, instrumentality or agency.
 - Example: State Ethics Commission
- Political subdivision of the State, or any entity created by a political subdivision
 - Examples: municipalities, League of Municipalities and school districts.

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Let's Review

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- Can a requestor submit an OPRA request by e-mail?
- Can an employee who is not the records custodian refuse to accept an OPRA request?
- What is a "government record" under OPRA?
- Are any records exempt from public access?
- Who is the custodian for a State agency?

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When is a response to an
OPRA request due?

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- Generally:
 - As soon as possible.
 - But no later than seven (7) business days after custodian's receipt of the request.
 - There should be another employee designated to receive/fulfill requests in the custodian's extended absence.
 - Day 1 of the response time is the day after the custodian receives the request.
 - All responses must be in writing.

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Are there exceptions to the standard seven day response time?

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- Yes!
- Immediate access shall ordinarily be granted to:
 - Budgets
 - Bills
 - Vouchers
 - Contracts
 - Government employee salary/overtime information.
- Immediate access means "on the spot."

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- The following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable:

- when crime reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims ...the safety of the victim and the victim's family, and the integrity of any ongoing investigation shall be considered in disclosing this information;

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- If an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

- Information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

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- Information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

- Information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and

- Information as to circumstances surrounding bail, whether it was posted and the amount thereof.

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What if the request cannot be fulfilled within the required time frame?

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- Custodians may obtain extension of time for legitimate reasons (examples: records in storage, medium conversion, voluminous request).
- Extension "request" must be in writing, within required response time (either standard or immediate) and include an anticipated date on which records will be provided.
- Requestor does not need to approve "request."
- Failure to grant/deny access by extended deadline date results in deemed denial.

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What if there is not enough information to fulfill the request?

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- A valid OPRA request must identify with reasonable clarity the specific government records sought.
- Custodians may seek clarification of an overly broad or unclear request, or deny access to request.
- Clarification request must be in writing within required response time.
- Response time stops until requestor responds. Time begins anew.

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What is an overly broad or unclear request?

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- A request that fails to identify with reasonable clarity the specific government records sought.
 - Example: "any and all records related to the construction of the new high school." "Records" is not a specifically identifiable government record.
 - Valid version: "any and all e-mails between Jane Doe and John Smith regarding the construction of the new high school between January 1, 2012 and present."

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- A request that requires the custodian to conduct research.
 - Example: "all meeting minutes from 2011 in which the Council discussed ABC Towing Company." Request requires custodian to read all 2011 minutes.
 - Valid version: "all meeting minutes from 2011." The requestor then must read the minutes himself to locate his desired subject matter.

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“Outlier” Court Case Regarding Overly Broad Requests

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- Burnett v. County of Gloucester (App. Div. 2010) – Request for "any and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present."
- Court held that not specifying the matters to which the settlements pertained did not render the request invalid. It is the documents themselves that have been requested and their retrieval requires a search, not research.

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What if the requested records are not in the custodian's possession?

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- Custodian must obtain records responsive from appropriate departments/personnel. This includes third parties.
 - Example: Custodian is required to obtain requested attorney's bills which are maintained by special counsel's office, and not the municipality.
- Custodians should document attempts made to access records from other departments/personnel.
- Other employees impeding access to government records can be found in violation of OPRA.

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How must a custodian respond to an OPRA request?

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- In writing! Verbal responses are not valid.
- Within required response time.
- By addressing each item requested, either:
 - Granting access;
 - Denying access
 - Seeking clarification
 - Requesting an extension of time.

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What is the cost to obtain records under OPRA?

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- Fee prescribed by law or regulation (if another law sets specific fee for specific record).
 - Municipal ordinances do not count!
- If no other fee established by law or regulation exists:
 - \$0.05 per page for letter sized printed pages
 - \$0.07 per page for legal sized printed pages

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- Actual cost of printed pages, if agency can prove costs exceed \$0.05/\$0.07. Actual cost calculation contained in November 2010 *OPRA Alert* on GRC's website.
- Electronic records (sent via e-mail or fax) are free of charge.
- CD, DVD, cassette, etc. – actual cost of material.

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What is a special service charge?

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- Labor fee for extraordinary/voluminous requests.
- Charges must be reasonable and based on actual direct cost (hourly rate of lowest level employee capable of fulfilling request, no fringe benefits).
- Cannot be established in advance by ordinance. Case by case determination.
- GRC's 14 point analysis helps determine if fees are warranted.
- Estimated in advance prior to being incurred. Requestor must agree to pay.

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Special Service Charge Example

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- Request: Meeting minutes from 2005 to present.
- 1,000 pages of responsive records will take custodian 2 ½ hours to copy.
- Custodian may likely charge her direct hourly rate for the 2 ½ hours required to fulfill request.
- Custodian must estimate cost and notify requestor before fulfilling the request.

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What if the request
substantially disrupts the
operations of the
agency?

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- Custodian may deny access only after attempting to reach a reasonable solution with requestor that accommodates the interests of both requestor and the agency.
- Accommodation varies based on circumstances of request.
- Subjective determination based on the resources of the agency.
- Applies in extreme scenarios only.

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- Example 1: Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 – Requestor submitted a 7 page, 59 item request spanning over 12 years of records.
- Example 2: Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-188 – Requestor submitted 13 item request, which included all fire safety violations issued from 1986-2006 and all complaints filed since 1997.

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What if only portions of a record are exempt from public access?

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- Custodians must redact, or “black out” any portion of a record that is exempt from public access.
- Redactions are denials of access and custodians must provide requestors with the specific legal basis for each redaction.

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What if an entire page of a document needs to be redacted?

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- Custodians should give the requestor a visible indication, such as a blank sheet bearing the words “page redacted” or a written list of specific page numbers being withheld.

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How are electronic records redacted?

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- Custodians should delete material to be redacted, but make visually obvious what has been deleted.
- Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes.

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Can a requestor ask for records in a specific medium?

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- Yes!
- A custodian must permit access to government records in the medium requested.
- If custodian does not maintain the record in the medium requested, he/she must:
 - Convert the record to the requested medium; or
 - Provide a copy in some other "meaningful" medium (meaningful to the requestor).

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Is there a fee to convert records to a specific medium?

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- Maybe. Actual costs apply.
- Example 1: Requestor wants a record sent via e-mail. Custodian must scan paper document to convert to electronic format. Request takes the Custodian 5 minutes to complete. No charges apply.
- Example 2: Requestor wants audio recording of a meeting on CD-ROM. Custodian copies recording in house onto CD-ROM agency purchased for \$0.50. Request takes Custodian 20 minutes to complete. Charge is \$0.50.

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- Example 3: Requestor wants large tax maps on CD-ROM. Custodian does not have capability to scan large maps and must use third party vendor. Vendor charges the agency \$5.00 for service. \$5.00 fee is passed onto requestor.
- Special Note: Vendor fees are special service charges and must be approved by requestor prior to being incurred.

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How must a custodian
send records to a
requestor?

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- A custodian must grant access to a government record by the specific method of delivery identified by the requestor.
 - Example: Requestor wants records sent via fax, custodian must send records via fax.
- Remember – all limitations on access shall be construed in favor of the public.

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Let's Review

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- When is a response to an OPRA request for contracts due?
- What should a custodian do if she cannot fulfill an OPRA request within the required time frame?
- A custodian calls a requestor to say that the requested records are ready for pickup. Is this a valid response to the request?
- What is the cost to provide records on DVD?

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Special OPRA Issues

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Can a small agency set specific times to receive/fulfill OPRA requests?

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- Yes!
- Who?
 1. Municipalities with a population of 5,000 residents or less;
 2. Board of Education with total enrollment of 500 or fewer;
 3. Public authority with less than \$10 million in assets.

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- What times?
 - Not less than 6 regular business hours over not less than 3 business days per week, or the entity's regularly scheduled business hours, whichever is less.
- What does this really mean?
 - 2 hours a day for 3 days a week, minimum, unless the agency's regularly scheduled business hours are less.

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What about privacy concerns?

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- OPRA states in its Legislative Findings, "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."
- In Burnette v. County of Bergen, 198 N.J. 408 (2009), the court held that OPRA's legislative findings are more than a preamble, and impose an obligation on agencies to protect against disclosure of personal information.

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- What does this mean?
 - The GRC has routinely upheld a custodian's redaction of home addresses and home telephone numbers due to privacy concerns.
- Each determination is made based on the specific facts of the complaint by balancing the requestor's need for the information against the agency's need to keep the information confidential.

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What about the commercial use of government records?

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- There is no restriction against the commercial use of government records under OPRA.
- This means there is no limitation on a business entity obtaining records through OPRA to be used for commercial gain.
- Example: attorney or chiropractor obtaining motor vehicle accident reports from police departments to use for direct mail solicitation.

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What if OPRA requests become excessive or harassing?

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- OPRA is silent on the number of OPRA requests one person can submit to a particular agency.
- Remember there are options in OPRA to help with "overwhelming" OPRA requests:
 - Requesting an extension of time to fulfill the request.
 - Assessing a special service charge.
 - Denying the request due to substantial disruption of agency operations.
- However, if you believe you are being harassed, you may have options in civil court. There are no remedies in OPRA itself.

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What if the requestor
asks for records that
have already been
provided?

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- Unless the custodian has proof at the time of the new OPRA request that the requestor is still in possession of the same records, access must be granted again.
- In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the court held that the complainant could not have been denied access to a record if he had the record in his possession at the time of the OPRA request.
- Important: The custodian had proof at the time of the request that the complainant was still in possession of the requested record. This decision is not universally applicable!

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What is the knowing and willful penalty?

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- 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 for initial violation;
 - \$2,500 for second violation within 10 years of initial violation;
 - \$5,000 for third violation within 10 years of initial violation.
- Penalty is paid personally by individual found in violation, not the public agency.

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- Extremely high standard for penalty.
 - Actions must have been much more than negligent conduct;
 - Individual must have had some knowledge that his actions were wrongful;
 - Actions must have had a positive element of conscious wrongdoing;
 - Actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden;
 - Actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent,
- heedless or unintentional.

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What are prevailing party attorney's fees?

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- When a requestor "prevails" in OPRA litigation (in court or with GRC) and is represented by legal counsel, the defendant public agency must pay the requestor's attorney's fees.
- What does it mean to "prevail?"
 - The filing of the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.
 - A factual causal nexus exists between the requestor's litigation and the relief ultimately achieved.
 - The relief ultimately achieved had a basis in law.

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What is the Government Records Council?

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- Court alternative to challenging a denial of access under OPRA.
- Prepares informational materials for requestors and custodians regarding OPRA.
- Provides OPRA training.
- Operates a toll-free inquiry hotline for OPRA questions.

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- 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 NJ Superior Court.
 - See GRC Regulations for details regarding each step .

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- When calling the GRC with an OPRA question, be aware of the following:
 - Information provided by the GRC is based on the information presented by the requestor or custodian and is not an official decision of the Council.
 - The GRC cannot tell a custodian exactly how to respond to an OPRA request.
 - The GRC provides *guidance not legal advice*.

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- What is the difference between *guidance* and *legal advice*?
 - Guidance: think of the GRC as a reference library. The GRC can give you all the resources you need (OPRA provisions, prior case law) so that you can make your own decision on whether to grant or deny access. The GRC cannot make this decision for you.
 - Legal Advice: The GRC cannot tell custodians exactly how to respond to a request. This is a conflict of interest in the event a complaint is filed with the GRC. Only your legal counsel can give you legal advice.

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- Sign up to receive free e-mail updates regarding OPRA, precedential cases, and new issues of *The OPRA Alert*.
- www.nj.gov/grc/news/news.
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