New Jersey Geospatial Forum

Open Public Records Act (OPRA) Task Force

Final Report

March 29, 2010

Respectfully submitted

on Behalf of the
OPRA Task Force
By
Task Force Co-Chairs
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New Jersey Geospatial Forum
OPRA Task Force
Final Report

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Mission Statement:

The GIS community has encountered a number of questions and problems regarding the Open Public Records Act and its application specific to GIS. The task force will elaborate on these questions, seek clarification on them from the Government Records Council (GRC), and convey the resulting information to the GIS community at large via its final report.

Background:

In March of 2007, Catherine Starghill, Esq., of the New Jersey Government Records Council, spoke to the New Jersey Geospatial Forum (NJGF) on New Jersey's Open Public Records Act (OPRA) and how it relates to Geographic Information Systems (GIS). Ms. Starghill's presentation generated many questions and concerns from the NJGF members. In an attempt to address these issues, the NJGF created the OPRA Task Force.

Using discussion points provided to the Task Force by the NJGF Executive Committee, the Task Force solicited scenarios from the entire Forum membership. These scenarios were compiled and categorized into the following:

> Category A: What constitutes a record? Whole database vs. a single record in the database. Issue: requests for specific data queries.
>
> Category B: Is cartography or analysis work required? Are you obligated to create something? Essentially become consultants.
>
> Category C: How much to charge for OPRA data and/or hardcopy deliverables, and/or for the time expended in creating something?
>
> Category D: Are OPRA forms standard or can GIS specific OPRA forms be created?
>
> Category E: Issues with copyrighted or licensed data.
>
> Category F: Withholding maps/data because of privacy and/or security issues.

The scenarios were then discussed with Ms. Starghill at a Task Force meeting and her responses can be found on the following pages.

GIS Scenarios & Responses from the New Jersey Government Records Council:

Category A: What constitutes a record? Whole database vs. a single record in the database. Issue: requests for specific data queries.

In general a record is anything maintained, kept on file or received in the course of official business. An entire database is a record as well as each record in that database.

1. It is often easier for me to provide requestors with GIS data for the entire municipality, rather than sub-setting the data myself. Is this an acceptable response to an OPRA request?

   If the requestor requested a subset of data that you can attain by executing a query on the database, you would have to provide only the subset of requested data. Providing the entire database would not be in compliance with OPRA.

2. If a county agency hosts municipal data (i.e. ArcIMS application) and county receives an OPRA request for the municipal data, is the county obligated to provide the data? The data is owned and maintained by the municipality but resides on a county server.

   Yes, you would have to provide the requested data. You must provide any requested data that is made, maintained, kept on file, or received in the course of business.

3. Our county created a dataset that is NOT used for any official decision-making or policy process, but it does have value for private sector firms. Can we sell it for a profit as a data or map product since it isn't used as a public record, per se?

   No, it does not matter if it is used for any official decision making or policy process; it is a record, simply by existing. You would not be able to sell if for profit, if requested under OPRA, nor can you ask the request about their intended use. To date, the GRC has not had a specific ruling on this issue.

4. Private vendors frequently use our county roads data as a basis for published street maps and use in GPS navigational systems. Before we release it to them we require them to sign a data sharing agreement that specifies that a) we are not liable for any accidents that might result from errors in the data or general use of the data, b) they may not redistribute our data to other vendors and service providers, and c) we should get credit for the use of our data in any printed maps that use it. While getting credit is nice, liability is our primary concern (http://news.cnet.com/Is-GPS-liability-next/2010-1033_3-6226346.html). Since our county keeps that roads database as a matter of public record, is such an agreement no longer legal? Does this data sharing agreement place illegal or inappropriate restrictions on the use of public records? Can we require the data sharing agreement UNLESS the requesting party submits their request through the formal OPRA process?

   Data sharing agreements which limit what a requestor can do with the data are invalid under OPRA.

5. Our County receives digital GIS data, digital tax maps from engineers and planners, etc. If these are requested, would we be required to provide them? They are a product that was created for the townships and have been provided to the County to assist with updating our data. We are concerned that if we re-distribute these, the engineers and planners will no longer be willing to give us this information.

   If the data is deliberative, meaning there has been no final approval or disapproval of the application, you would not be required to release it. If there has been a final disposition, approved or disapproved, then you would be required to release it.

6. Similarly, do digital subdivision plans that are filed with a County Clerk office as a County requirement need to be provided under OPRA?

   Yes they would have to be released. Anything that is made, maintained, kept on file or received during the course of business is an OPRA record.

Category B: Is cartography or analysis work required? Are you obligated to create something? Essentially become consultants.

*In general you are **not** required to create a new record under the OPRA regulations. Requests generally fall into two categories; search or research. You are required to comply with a search of your data whereas you are not required to provide research. The definition of research, when it comes to digital data which is either spatially relatable or relatable by a common key field, has **not** been well defined in the current OPRA regulations. There seems to be some willingness on the part of the GRC under the current regulations to require some amount of "research" if it requires mostly computer manipulation to provide the data as requested. Based on the definition of research as mentioned in the search vs. research section of the OPRA Reference Materials Email from the GRC (see appendix A), it would seem that taking two or more datasets and combining them to create a secondary dataset would be considered research, but the presumed or apparent "ease" of creating that secondary dataset with current software technology may be a factor in any GRC determinations under the current regulations. There have been no adjudications on this issue so it continues to be a source of confusion. This issue seems to be the most open for interpretation and a possible source of difficulty for the GIS community affected by the OPRA regulations.*

Examples of Search vs. Research provided by the OPRA Task Force:

Search:

A requestor has asked for a subset of records found in a single database in which a column or field exists that differentiates the data in this way. For example: If someone requested your road centerlines, but only those roads that have a speed limit of 25 miles per hour. If your road centerline file has a column or field for Speed Limits, which you can search for speed limits equal to 25 mph, then you must provide only the data requested. If your road centerline file does not contain a field listing the speed limits of the roads, then you would not be required to **research** the information for the requestor.

Research:

A requestor has asked for a combination of information from 2 or more databases/datasets (the definition of a database is still open for interpretation). If there is a key field, established script or query, that links the 2 databases on a regular basis you would need to provide the requested information. For example if your farmland preservation information is joined to your parcel data on a regular basis, but the data actually resides in 2 separate databases, you would still have to provide the farmland preservation information along with the parcels if requested. If you would have to create a key field on which to join or perform some sort of spatial analysis or create a new dataset, you would not be required to fill such a request. It seems that if the data is joinable either spatially or by a key field the GRC **might** tend to require the records custodian to comply with the request, but as stated above this issue has never come before the GRC for review and so the actual outcome is uncertain.

1. We do a significant amount of work for "local" engineering firms, which take up considerable time both a) specific data queries, b) cartographic analysis work and c) time expended in creating something. The County is in the process of preparing a resolution that would require professional firms, not Joe public, to reimburse the County for the time (benefits included).

   Statement a) above; you would have to comply with the request

   Statement b) above; you may not have to comply with the request if it can or would be categorized as research or creating a new record.

   If you are required under OPRA to provide the records as requested, you can only charge the requestor what it reasonably cost to provide the information. You cannot include benefits in your calculation and you must use the salary of the lowest paid employee that can reasonably fulfill the request at the time. If you are not required under OPRA to provide the records as requested, then OPRA does not apply.

2. We received a request for all the forested properties in the county. This doesn't exist as a prepared dataset. We have the source data that it could be generated from but it would take time and analysis to do so. Are we obligated to do the analysis? If we did the analysis, could we charge for the staff time? Essentially we could become consultants for any requestor.

   This may be considered research and/or creating a new record and you would not have to comply with the request. Under the spirit of the law, you must disclose what data is available, but there is generally no need to create a new record. Again, this point of research, when it comes to digital data which is either spatially relatable or relatable by a common key field, has not been well defined in the current OPRA regulations.

3. We provided data to a requestor who was not happy with the table of information that was provided with the geographic data and wanted a new column of information. The requestor called us repeatedly asking for the information which did not exist, however, we tried to assist them by referring them to other agencies and suggesting methodologies they could use to create the new column or perform a 'work around'. Overall, many hours of county employee time was expended in assisting the requestor. Are we obligated to help them? Could we have assigned a programmer to create the new column and charged them for his time?

   No, you are not obligated under OPRA to instruct a requestor on how to use, view or manipulate the requested records. You would not have to create a new column to provide the information requested, that would require research and/or the creation of a new record.

Category C: How much to charge for OPRA data and/or hardcopy deliverables, and/or for the time expended in creating something?

If you are required under OPRA to provide the records as requested, you can only charge the requestor what it reasonably cost to provide the information. You cannot include benefits in your calculation and you must use the salary of the lowest paid employee that can reasonably fulfill the request at the time. Under the spirit of the law, if someone of a lower salary is able to fulfill the request, but is not available during the time frame as designated by OPRA, you should inform the requestor that if they wish to wait for that person to fulfill the request it would cost less than if the request is fulfilled immediately. You must make a good faith estimate, but you are not bound by that estimate. It could be more or less in the end, but you should include that caveat. You can also offer an alternative solution, for example offer to provide the data and suggest they do the work, along with the estimate, but not in lieu of the

estimate. If you are not required under OPRA to provide the records as requested, then OPRA fee regulations do not apply.

1. We do a significant amount of work for "local" engineering firms, that takes up considerable time both a) specific data queries, b) cartographic analysis work and c) time expended in creating something. The County is in the process of preparing a resolution that would require professional firms, not Joe public, to reimburse the County for the time (benefits included). (Can you charge one group of people and not another?)

   If you are required under OPRA to provide the records as requested, you can only charge the requestor what it reasonably cost to provide the information. You cannot include benefits in your calculation and you must use the salary of the lowest paid employee that can reasonably fulfill the request at the time. You cannot charge one group differently then another group. If you are not required under OPRA to provide the records as requested, then OPRA does not apply.

2. Our parcel datasets are actually a complex series or 34 individual files hosted on 12 different servers. While our custom in-house software connects them all as a singular database, the individual files would be hard to make sense of to an outsider. A local real estate firm wants to conduct analysis of property records to identify potential properties to purchase. In response to their requests, the County provided them with a pdf of the area instead of the complex dataset. Do we have to provide them with the raw datasets themselves?

   You must provide the "raw" data if requested. If there is a key field, established script or query, that links these databases on a regular basis you would need to provide the information compiled into one dataset, if requested.

   They want us to at least explain to them the highly complex, poorly documented coding system that is used for linking these many different databases together. If we create a metadata or explanation file, can we bill them for the time it takes to do that? Another question, do we have to explain our data?

   No, you do not have to provide training or instruction on the use of your data or any specific software required to utilize the data.

3. We create maps for the public that may or may not involve analysis to create the data necessary to produce the map (maps vary and include but are not limited, to aerial photos, property boundaries showing how much is wetlands and different types of soil). What is the proper price structure? Can we charge for the cost of printing the map as well as the approximate amount of time spent in creating the map and performing analysis/creating the data needed for the map?

   If it is a record (map) that already exists, then you can only charge the cost of reproducing or printing that document. If the record (map in this case) does not exist, you are not required to produce the map under the OPRA regulations. OPRA rules for fees or special service charges would not apply.

Category D: Are OPRA forms standard or can GIS specific OPRA forms be created?

1. We have tailored our forms to fit exactly the services we are willing to provide, such as mapping.

   No, you cannot create a form which limits the requestor's ability to request a record in a specific medium.

2. In our GIS specific form, we also include a line for 'Special Services Fee' which we use to charge for time in preparing data, analysis or map creation.

*It is okay to have a special service fee as long as you do not have a specific hourly rate applied to all requests regardless of the hourly wage of the person performing the work. You cannot have a pre-established price schedule for certain tasks, each special service charge fee must be calculated for the specific request. It is also important to clarify that the hourly service charge rate can only be applied when additional time, **above** the time to make a copy of a record, is required.*

Category E: Issues with copyrighted or licensed data.

*In general copyrighted data is **not** excluded from the OPRA regulations. The GRC would tend to uphold a license agreement so licensed data would be excluded from the OPRA regulations if releasing the information would be in direct conflict with the license agreement. License agreements should not be confused with data sharing agreements. A data sharing agreement cannot be used as a basis for denying a request.*

1. We had a hard time initially with this and eventually decided to send the requestor to the source of our information so we were not in any way breaking license agreements or copyright laws.

   Sending the requestor to the source of the information, if you have it on hand, is not an appropriate response under OPRA. If the record exists at your office, you will need to provide a copy of the record. A record is anything maintained, kept on file or received in the course of official business. In order for such data to be exempted it would need to qualify for one of the 24 OPRA Exemptions (see NJSA 47:1A-1.1). Number 4 (trade secrets and proprietary commercial information) & number 9 (provide advantage to competitors) seem to specifically apply.

2. Our municipality contracted for topographic data to be created and the private vendor copyrighted it but gave us a license for use WITHIN the agency but clearly forbade redistribution. (We simply couldn't afford more at that time) Does their copyright preclude the data from being requested under OPRA?

   *In general copyrighted data is **not** excluded from the OPRA regulations. The GRC would tend to uphold a license agreement so licensed data would be excluded from the OPRA regulations if releasing the information would be in direct conflict with the license agreement.*

   Are we forbidden from using that data for policy decisions?

   OPRA is not restricted to data or records that are used for policy decisions.

3. Our municipality acquired satellite imagery to identify likely zoning violations but the private vendor would only sell us a license for use WITHIN the agency and clearly forbade redistribution. Does their copyright preclude the data from being requested under OPRA?

   *In general copyrighted data is **not** excluded from the OPRA regulations. The GRC would tend to uphold a license agreement so licensed data would be excluded from the OPRA regulations if releasing the information would be in direct conflict with the license agreement.*

   Are we forbidden from using that data for policy decisions?

   OPRA is not restricted to data or records that are used for policy decisions.

Category F: Withholding maps/data because of privacy and/or security issues.

In general there are 24 OPRA Exemptions (see NJSA 47:1A-1.1). The custodian must demonstrate that the denial is authorized by law and the burden of proof is on the custodian.

1. A GIS analyst from a transportation planning agency in northern NJ asked my department (NJ DHS) for the addresses of Medicaid recipients (our Division of Medical Assistance and Health Services administers Medicaid funds) in order to help route public transportation to the people most likely to use it. The personal information of Medicaid recipients is protected by the Federal Health Insurance Portability and Accountability Act (HIPAA). Unfortunately, HIPAA is about as well-defined as OPRA. Our department's legal interpretation is that HIPAA only allows the release of spatial data when it is aggregated to the first three digits of the zip code (a.k.a. section center zone -- there are 20 of these zones in NJ). This coarse level of aggregation is virtually useless for bus routing, so the requestor dropped the request. However, I'm afraid to be the test case if something like this comes up again. I've read the HIPAA legislation and I can't make out any reference to geography. It seems like aggregating to census tract level might be a more logical compromise, but as with OPRA, the authors of HIPAA don't seem to have consulted a geographer.

   You would not have to release this information if it is covered under HIPAA.

   We also have the addresses of food stamp and Temporary Assistance to Needy Families (TANF) recipients, people with cognitive and physical disabilities, locations of group homes for persons with mental illness, fathers who are behind in child support payments and lots of other sensitive information. We can redact names and addresses, but unless someone lives in a high rise, lat/long is essentially identification.

   The GRC routinely upholds the redaction of addresses and phone numbers (not names) from the records requested through OPRA, except in those instances where the request was made to a municipal tax collector's, tax assessor's, clerk's or county clerk's office for property ownership records.

   My coworker alluded to survey data that we routinely collect. We do this with the understanding that the data will be confidential but OPRA might supersede this agreement.

   No specific answer was provided.

   As my coworker mentioned, it all comes down to aggregation. If we could get the legislature to include language to the effect that address/spatial point data must be aggregated to census tract level or (better, still) municipal level, I think that we and the taxpayers would be much better served.

   No specific answer was provided.

2. Currently, our Office of Emergency Management reviews all requests for aerial photos and requires that we block out any areas that they feel are of concern for Homeland Security reasons. In some cases we have denied requests for digital aerials because portions were considered a concern.

   It is okay to have redactions for security reasons, but you must be able to defend those reasons.

Outstanding Issues:

There are 2 interrelated issues that could have considerable impact on Governmental GIS Agencies that have not come before the GRC or the Appellate Division of NJ Superior Court for adjudication, which continue to receive varied and often conflicting responses on the GRC's "likely" ruling, if such an issue was brought before them for adjudication. Much of the confusion can be attributed to the "perceived" ease of accommodating the request, due to currently available and utilized computer and software systems.

The first is the issue of search vs. research. This issue has not been tested through a Denial of Access Complaint filed with the GRC and is still open to a lot of interpretation. On the one hand, if you must name an identifiable record according to the regulations, and you are asking for a compilation of several datasets to derive a new dataset, one would think that would not be an identifiable record.

But, if it is in your ability to provide the new dataset, from the GRC's viewpoint, under the current regulations, you might be required to do so, especially since you would most likely be able to apply a service charge to these types of requests. OPRA allows you to deny access, if the request will create a substantial disruption to the organization, ONLY after an attempt at a reasonable accommodation has been made. The size of your organization would weigh heavily in the GRC's decision to uphold or disallow the custodian's denial.

The second issue is the GRC's definition of a database. The GRC's view is that a database as well as every record in that database is considered a record. There are several issues that are specific to large and/or multifaceted relational database management systems (RDBMS) which can contain non spatial tabular and/or spatially referenced data as separate "tables" within a single "database". For the RDBMS user the word "table" is analogous to a standalone database and the word "database" is essentially a container providing space for each table.

This is especially true for the GIS community where typically large amounts of unrelated datasets which are spatially referenced are housed as separate tables in one or more large "databases" in a RDBMS. Often the only relationship between these GIS data tables or layers to other tables or layers in the "database" is a spatial relationship. There are no key attribute fields which link data from one record in a table to a record in another table within the same "database". For example a certain type of soil is contained on a specific parcel which is only determined through a spatial relationship. The coordinate position of the soil polygon is within the coordinate position of the parcel boundaries and therefore when you superimpose the 2 layers using GIS software the soil polygon will appear within the boundaries of the parcel polygon. There are no other attributes or fields in the tabular data of each dataset which would link that soil polygon to that specific parcel polygon. Again, this "perceived" ease of accommodating the request, due to currently available and utilized computer and software systems may influence the GRC's adjudication of a denial of access complaint in certain situations where a requestor has asked a public agency to create a new dataset (layer) by selecting records from one dataset (layer) based on data from another dataset (layer).

Conclusions:

The information in this document pertains only to requests for records made as an official OPRA request on an OPRA request form. A custodian should revisit the GRC's website http://www.nj.gov/grc often for updated information and recent GRC and court decisions regarding common OPRA-related topics.

Not every request is subject to the OPRA regulations, but in general most records maintained by a government office are subject to the OPRA Regulations unless protected under some other regulation. There is no restriction against commercial use of government records under OPRA. The GRC has jurisdiction over access to government records. It does not have any jurisdiction over what is contained in those records or the accuracy of the data within those records. The GRC cannot therefore make any statements on the liability of the data provider for the data that was supplied in accordance with an OPRA request.

The decision of the GRC is not necessarily the end of the line. The case can be appealed in the Appellate Division of NJ Superior Court. In either case any decisions of the GRC or the NJ Superior court would be used to set future precedent.

The GRC routinely upholds the redaction of addresses, home email addresses and phone numbers (not names) from the records requested through OPRA, except in those instances where the request was made to a municipal tax collector's, tax assessor's, clerk's or county clerk's office for property ownership records.

There are several reasons why a request may be denied, according to the GRC. Please refer to OPRA's 24 Exemptions from Disclosure (appendix E) for a complete list of exemptions. If the request is broad and unclear, remember the requestor must name an identifiable record. If you have an idea of what the requestor is looking for but they have not asked for the correct record, you can and should, under the spirit of the law, according to the GRC, state something like: I believe you are looking for this, correct? If so, please submit a revised OPRA request.

There are exemptions for security reasons: If the custodian put together a well supported and documented statement as to why releasing the record would create a security issue, the GRC might uphold the denial.

When a request creates a substantial disruption to the organization: If complying with the request would create a substantial disruption to the organization, the custodian may deny access to the record(s) only ***after*** attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. There would likely be a subjective threshold applied to such a denial. For example smaller agencies might have a better chance of the GRC ruling in favor of this type of denial.

A custodian may impose a special service charge related for extraordinary requests. An extraordinary request should meet the GRC's Special Service Charge; 14 Point Analysis (appendix F). These charges must be reasonable and based on actual direct cost. The actual direct cost must be based on the hourly rate, not including fringe benefits, of the lowest level employee capable of fulfilling the request.

Recommendations:

Most public agencies will be affected by the OPRA regulations at one point or another. The spatial data which is developed to support governmental operations can be costly and time consuming to create and for this reason, there is much interest on the part of the producer to protect their investment as well as limit their exposure to any possible liability associated with the accuracy and/or completeness of any datasets they release. This data also continues to be of interest to other agencies, public and/or private, which would rather utilize existing datasets than duplicate efforts and recreate the data.

OPRA does not have any authority over the accuracy and/or condition of any records produced by a public agency. The NJGF OPRA Task Force suggests that any agencies having concerns regarding liability should focus on complete and accurate metadata development along with proper records management to reduce the possible misuse of released datasets. Metadata is data about your data. It documents the data elements or attributes, data structures or schema, where it is located, who created it, when it was created and/or updated, why it was created and the intended uses of the data. It should also include descriptive information about the context, quality and condition, or characteristics of the data. Data of undocumented age, accuracy, development history, attribute meanings, and sources may quickly become useless or improperly utilized. A statement in your metadata similar to the following **may** reduce or eliminate an agencies liability in regard to use of data supplied by that agency. The "*Providing Agency"* shall assume no liability for: 1. Any errors, omissions or inaccuracies in the information provided regardless of how caused; or 2. Any decision made or action taken or not taken by the reader/user in reliance upon any information or data furnished herein.

Proper records management, such as following current retention laws and archiving, may help to control the amount of information you maintain, and are ultimately responsible for under OPRA. All data custodians should be aware of, and in compliance with, current retention laws. More information can be found at the New Jersey Division of Archives and Records Management. http://www.state.nj.us/state/darm/links/recman.html

Based on the continued fluctuation on the issue of search vs. research, there is a concern on the part of many governmental agencies about the possibility of being required to provide, in a sense, consulting work for the private sector, due to the perceived ease of carrying out these requests and the attitude that these agencies will be able to recoup their expenses by charging a special service fee. These views are of little consequence for most governmental agencies which continue to have a backlog of everyday work as well as the difficulty in actually determining what an accurate special service fee would be. On the other hand there are also many private sector agencies, whose normal work is to provide this type of consulting work, that may have their own concerns of possible reductions in future work proposals. Since the NJGF is an open organization of individuals from many different sectors sharing a common interest in geospatial technologies, a NJGF supported group would not be the appropriate means of addressing this issue. The NJGF OPRA Task Force would suggest that if there is enough concern from public sector regarding the question of their responsibility under OPRA regarding GIS data and analysis, individuals from these organizations should consider forming a group outside of the NJ Geospatial Forum to work on and propose reasonable amendments to the OPRA Regulations, which would avoid the possibility of governmental agencies being compelled to provide data analysis and/or creation to the public and/or other private companies while maintaining the spirit of OPRA to provide public access to appropriate government records.

From: Lownie, Dara [DLownie@dca.state.nj.us]
Sent: Thursday, June 11, 2009 9:24 AM
To: Patricia Leidner
Cc: Starghill, Catherine
Subject: OPRA Reference Materials
Attachments: MAG Entertainment v ABC.doc; Bent v. Township of Stafford Police Department Oct. 2005.rtf; NJ Builders Association v NJ Council on Affordable (App Div January 24 2007).pdf; Special Service Charge - 14 points.pdf; OPRA Seminar 3rd Flyer.pdf; DEP Proposal.pdf

Dear Patricia,

As we discussed at the Task Force meeting on Monday, I am sending you reference materials regarding various OPRA issues. I have broken down the resources by subject below:

Broad or Unclear Requests

Below is standard language the GRC uses when addressing whether requests are broad or unclear:

> The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information*. *Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1.*" (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.
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> Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."
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> Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "…when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA…"

I have attached copies of these three cases for your convenience.

Search vs. Research

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that "the Custodian is obligated to ***search*** her files to ***find*** the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to ***research*** her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word ***search*** is defined as 'to go or look through carefully in order to find something missing or lost.' ("Search." Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.) The word ***research***, on the other hand, means 'a close and careful study to find new facts or information.' ("Research." Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd .)"

You may access this decision on our website at http://www.nj.gov/grc/decisions/pdf/Donato%20v.%20Township%20of%20Union,%202005-182.pdf.

Special Service Charge

OPRA provides that:

"[w]henever 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." N.J.S.A. 47:1A-5.c.

The actual direct cost relates to the hourly rate of the lowest level employee capable of fulfilling the request.

I have attached our special service charge handout which lists the 14 questions the GRC will ask a custodian, if a complaint is filed, to determine whether a special service charge is warranted and reasonable.

Substantial Disruption

OPRA provides that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency."

Below is an excerpt from Caggiano v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007).

> The Custodian certifies that the Division does not have the resources for an extended period of review because the Division is shorthanded. An extended review as contemplated by the Complainant (for approximately a week) would substantially disrupt agency operations by requiring the extended attendance of a Division of Consumer Affairs employee and a NJ State Police Officer at the Complainant's inspection of the requested records.
>
> The Custodian has reasonably offered to provide the Complainant with copies of all the records responsive upon payment of the statutory copying rates, which the Complainant has declined. The Custodian has also reasonably offered the Complainant two (2) hours to inspect the seven hundred forty-five (745) pages responsive to the Complainant's request, of which the Custodian states a substantial portion are records which the Complainant himself submitted to the Division. Additionally, the Custodian has reasonably offered to accommodate the Complainant's request by charging a special service charge for the hourly rate of a Division of Consumer Affairs employee to monitor the Complainant's inspection of the requested records in the event that said inspection exceeds two (2) hours. Further, the Custodian has reasonably offered to copy the remaining records at the OPRA copying costs in the event the Complainant exceeds a reasonable amount of time for the record inspection, which the Custodian states is one (1) business day. However, the Complainant objects to paying any inspection fees, as well as a two (2) hour inspection time limit.
>
> Because the Custodian has certified that the extended records inspection contemplated by the Complainant (approximately one week) would substantially disrupt the agency's operations, and because the Custodian has made numerous attempts to reasonably accommodate the Complainant's request but has been rejected by the Complainant, the Custodian has not unlawfully denied access to the requested record under N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g.

You may access this decision on our website at http://www.nj.gov/grc/decisions/pdf/2007-69.pdf.

Additionally, below is an excerpt from Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-188 (April 2008).

> The Complainant's June 22, 2007 OPRA request included a request for records pertaining to all fire safety violations from 1986 to 2006 for seven (7) separate violations. The Custodian requested that the Complainant modify his request, because "[a] blanket request for 20 years of inspection records would substantially disrupt the Division's operations in that the Division annually inspects approximately 6,000 properties. All of these files, and possibly 20 years of data within a single file, would have to be reviewed for redaction purposes..."
>
> Based upon the Appellate Division's decision in New Jersey Builders Association v. New Jersey Council On Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) the

> Complainant's voluminous June 22, 2007 OPRA request, a thirteen (13) paragraph request including numerous records spanning twenty (20) years, is not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for . . . a brief description of the record sought." *Id*. at 179. See also Vessio v. Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).

You may access this decision on our website at http://www.nj.gov/grc/decisions/pdf/2007-188.pdf.

License Agreements

The GRC does not have any decisions that directly address this issue; however below is a summary of facts from NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006).

> The Custodian states that in order to read the CD-ROM, software that is manufactured by a third party is required. And, therefore, in order to access their policies and procedures, using the CD-ROM, the purchase of a software license is required. The Custodian informs the Complainant that the current cost of the software is $139.00. And, the Division charges an additional $6.79 to cover the cost of preparing the CD-ROM.

You may view this decision on our website at http://www.nj.gov/grc/decisions/2004-114.html.

Copyright

On two (2) occasions the GRC has held that copyright law does not prohibit access to records under OPRA.

In Albrecht v. NJ Department of Treasury, GRC Complaint No. 2006-191 (July 2008), the GRC held that "[b]ased on the court's decision in Board of Chosen Freeholders of the County of Burlington v. Tombs 2006 U.S. App. LEXIS 31234 (December 18, 2006), copyright law does not prohibit access to a government record which is otherwise available under OPRA."

You may view this decision on our website at http://www.nj.gov/grc/decisions/pdf/2006-191.pdf.

Similarly, in Grauer v. NJ Department of Treasury, GRC Complaint No. 2007-3 (November 2007), the GRC held that "[b]ased on the court's holding in Board of Chosen Freeholders of Burlington County v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006) and the GRC's decision in Albrecht v. New Jersey Department of Treasury, GRC Complaint No. 2006-191 (July 25, 2007), copyright law does not prohibit access to a government record which is otherwise available under OPRA."

You may view this decision on our website at http://www.nj.gov/grc/decisions/pdf/2007-03.pdf.

NJ Department of Environmental Protection's Proposed Amendment to OPRA

I have attached a copy DEP's proposal to this e-mail.

OPRA Training

The GRC is hosting its 3rd Annual OPRA Seminar for the Public on August 26, 2009. I have attached a flyer to this e-mail. All are welcome to attend – no charge, no registration required.

Please feel free to contact me if you have any questions.

Sincerely,

Dara Lownie
Senior Case Manager
State of New Jersey
Government Records Council

tel: 609-341-3479 | fax: 609-633-6337

MICHAEL J. BENT, Complainant-Appellant, v. TOWNSHIP OF STAFFORD POLICE DEPARTMENT, CUSTODIAN OF RECORDS, Defendant-Respondent.

DOCKET NO. A-1456-04T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

381 N.J. Super. 30; 884 A.2d 240; 2005 N.J. Super. LEXIS 309

October 3, 2005, Submitted
October 21, 2005, Decided

SUBSEQUENT HISTORY: [***1] Approved for Publication October 21, 2005.

PRIOR HISTORY: On appeal from a Final Decision of the Government Records Council.

DISPOSITION: Affirmed.

COUNSEL: Michael J. Bent, appellant, Pro se.

Gilmore & Monahan, attorneys for respondent, Township of Stafford (Stephen K. Foran, on the brief).

Peter C. Harvey, Attorney General of New Jersey, attorney for respondent, Government Records Council (Debra A. Allen, Deputy Attorney General, on the statement in lieu of brief).

JUDGES: Before Judges Cuff, Parrillo and Holston, Jr. The opinion of the court was delivered by PARRILLO, J.A.D.

OPINIONBY: PARRILLO

OPINION:

[**242] [*33] The opinion of the court was delivered by

PARRILLO, J.A.D.

This is an appeal by Michael Bent from a final administrative determination of the Government Records Council (GRC) dismissing with prejudice his denial of access complaint pursuant to the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*. We affirm.

By way of background, on March 23, 2004, Bent filed a request for public records with the Stafford Township Custodian of Records. In this request, which consisted of five subparts lettered "a" through "e", Bent sought documents comprising the "entire file" of his criminal [***2] investigation conducted jointly by the Stafford Township Police Department (STPD), the United States Attorney for [*34] New Jersey, and a special agent of the Internal Revenue Service. n1 Additionally, Bent requested that the custodian provide him with "the factual basis underlying documented action and advice to third parties to act against my interest [having] been credited [**243] to SPD under a Federal Grand Jury credit card investigation."

n1 Apparently shortly after the STPD investigation commenced, it was transferred to the United States Attorney's Office on April 15, 1992 following which the role of the STPD was limited to assisting federal investigators. Ultimately, in September 1998, Bent, a former Stafford Township Committeeman and a certified public accountant, pled guilty to a single count of filing a false 1988 personal income tax return in violation of *26 U.S.C.A. § 7206*. Shortly thereafter, on May 31, 1999, Bent filed a complaint in Superior Court against Stafford Township and other individuals, alleging malicious prosecution and violations of his federal and state constitutional rights due to their involvement in the 1992 search of his home and cooperation with federal prosecutors. The summary judgment dismissal of this lawsuit was affirmed on appeal.

[***3]

On March 30, 2004, the custodian responded by letter, specifically addressing the OPRA requests Bent listed in each of the five subparts of the March 23, 2004 request form. As to requests, "a" and "d", the custodian explained that complete copies of the two police files maintained by STPD had been provided previously to Bent, and further, that requests "b" and "c" consisted of statements, investigation theory and opinions, which are not "government records" under OPRA. As to the final request "e", the custodian advised that records of Ocean

County grand jury subpoenas were sent directly to federal agents and, therefore, could not be provided.

Bent filed two supplementary requests, on March 29, 2004, and April 2, 2004. As to the former, the custodian advised that the STPD was not required under OPRA to respond because the correspondence contained a series of opinions, interpretations and statements, and not a request for government records. Likewise, the latter request also failed to request any new records and merely posed a series of questions. Therefore, the custodian considered Bent's OPRA request closed and informed Bent that [*35] the STPD would not respond to further repetitive requests [***4] for the same records.

On May 3, 2004, Bent filed a "complaint form" with the Stafford Township Mayor's Office, complaining of misconduct committed by the STPD and the custodian in the handling of his OPRA requests. Specifically, Bent claimed that the custodian had not provided the "entire SPD file" as he had requested previously. Thereafter, on June 16, 2004, Bent filed a "denial of access" complaint with the GRC repeating the allegations contained in the May 3, 2004 Stafford Township Mayor's Office complaint form, alleging that the custodian did not respond to his request and withheld records in the file without explanation. The custodian responded, in part, with a certification to the effect that copies of all Stafford Township records relating to Bent's criminal investigation have previously been provided to Bent, and that the balance of his claim was not a legitimate OPRA request for records, but rather for interpretations and opinions.

On October 14, 2004, the GRC's Executive Director recommended dismissal of Bent's complaint because the custodian properly addressed Bent's OPRA request. Specifically, the Executor Director concluded that although the May 3, 2004 correspondence [***5] may have constituted an OPRA documents request under *N.J.S.A. 47:1A-1*, the information sought did not fall within the statutory definition of "government record," and hence, there was no denial of access. As to Bent's argument that the custodian *should* have maintained specific documents on file, the Executive Director found that OPRA does not specify the types of records "required by law or regulation to be '. . . made, maintained and kept on file . . .' *N.J.S.A. 47:1A-1.1*."

On October 14, 2004, the GRC voted unanimously to accept the Executive Director's "Findings and Recommendations," and issued a final decision dismissing Bent's complaint. On appeal, Bent argues that the requested information constitutes non-exempt [*36] public records subject to disclosure under OPRA and required to be maintained in the township's files. We disagree.

OPRA embodies the public policy of New Jersey that:

> government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations [**244] on the right of access accorded [***6] by [OPRA] . . . shall be construed in favor of the public's right of access . . . .
>
> [*N.J.S.A. 47:1A-1.*]

OPRA takes the place of the former Right to Know Law, *N.J.S.A. 47:1A-2 to -4*, repealed by *L.* 2001, *c.* 404, and continues "the State's longstanding public policy favoring ready access to most public records." *Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363, 817 A.2d 1004 (App. Div. 2003)*. Thus, "all government records shall be subject to public access unless exempt." *N.J.S.A. 47:1A-1*. On this score, the custodian of the government record has the burden of proving that the denial of access is authorized by law. *N.J.S.A. 47:1A-6*.

Although expansive, OPRA's definition of "government record" demarks the outer limits of the statute's reach. Importantly, OPRA limits its definition of "government record" to:

> any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or [***7] any copy thereof, that has been made, maintained or kept on file in the course of . . . official business . . . or that has been received in the course of . . . official business . . .
>
> [*N.J.S.A. 47:1A-1.1.*]

This definition is not as broad as the common law definition of "public records". *Bergen County Improvement Auth. v. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 509-10, 851 A.2d 731 (App. Div.), certif. denied, 182 N.J. 143, 861 A.2d 847 (2004)*. Moreover, OPRA affirmatively excludes from such definition twenty-one separate categories of information, *N.J.S.A. 47:1A-1.1*,

thereby "significantly reducing the universe of publicly-accessible information." *Id. at 516-17*. For instance, OPRA directs State custodians of public records to deny access to documents that are exempt from disclosure under federal law. *N.J.S.A. 47:1A-5(a), -9*. Another exemption shields from disclosure [*37] documents "deliberative in nature, containing opinions, recommendations, or advice about agency policies," and "generated before the adoption of an agency's policy or decision. [***8] " *Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 219, 877 A.2d 330 (App. Div. 2005)*; *N.J.S.A. 47:1A-1.1*.

Significantly for present purposes, OPRA only allows requests for records, not requests for information. *See MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49, 868 A.2d 1067 (App. Div. 2005)*. In this regard, OPRA "is not intended as a research tool . . . to force government officials to identify and siphon useful information." *Id. at 546*. In other words, a records custodian is not required "to conduct research among its records . . . and correlate data from various government records in the custodian's possession." *Id. at 546-47*. (internal citation omitted). To qualify under OPRA then, the request must reasonably identify a record and not generally data, information or statistics.

Nor does OPRA "authorize a party to make a blanket request for every document" a public agency has on file. *See Gannett, supra, 379 N.J. Super. at 213*. Rather, a party requesting access to a public record under OPRA must specifically [***9] describe the document sought. *Ibid.*; *see also MAG Entm't, supra, 375 N.J. Super. at 546-49*. OPRA operates to make identifiable government records "readily accessible for inspection, copying, or examination." [**245] *N.J.S.A. 47:1A-1*. As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents. OPRA does not authorize unbridled searches of an agency's property. In fact, if a request "would substantially disrupt agency operations, the custodian may deny . . . [it and] . . . attempt[] to reach a reasonable solution . . . that accommodates the interests of the requestor and the agency." *N.J.S.A. 47:1A-5(g)*.

[*38] In the event access is denied, the GRC, within the Department of Community Affairs, is the administrative body charged with adjudicating OPRA disputes. *N.J.S.A. 47:1A-6*. n2 Specifically, *N.J.S.A. 47:1A-7(b)* provides, in part, that the GRC shall "receive, hear, review and adjudicate a complaint filed by any person concerning [***10] a denial of access to a government record by a records custodian." The purpose of its adjudicatory proceedings is to ". . . render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access . . ." *N.J.S.A. 47:1A-7(e)*.

n2 A person who is denied access to a government record by the custodian of record may, alternatively, "institute a proceeding to challenge the custodian's decision", in the Law Division. *N.J.S.A. 47:1A-6*.

Here, the GRC properly applied these governing principles in concluding there was no denial of access under OPRA. In the first place, to the extent Bent's request was for discrete records of the 1992 criminal investigation conducted by the STPD, the undisputed evidence is that there was full disclosure of all such documents in the custodian's possession. Second, to the extent Bent's request was for records that either did not exist or were not in the custodian's [***11] possession, there was, of necessity, no denial of access at all. n3

n3 Indeed, Bent offers no competent proof to the contrary, but simply assumes their existence based on his own review and interpretation of IRS and other "third party" documents generated by the federal investigation.

Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents "made, maintained or kept on file in the course of [a public agency's] official business," as well as any document "received in the course of [the agency's] official business." *N.J.S.A. 47:1A-1.1*. Contrary to Bent's assertion, although OPRA mandates that "all government records . . . be subject to public access unless exempt," the statute itself neither specifies nor directs the type of record that is to be [*39] "made, maintained or kept on file". *Ibid.* In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, [***12] we found no requirement in the law concerning "the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense." *River Edge Sav. & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 545, 398 A.2d 912 (App. Div.), certif. denied, 81 N.J. 58, 404 A.2d 1157 (1979)*. *See also*, *State v. Marshall, 148 N.J. 89, 273-75, 690 A.2d 1 (1997)*; *Daily Journal v. Police Dep't of City of Vineland, 351 N.J. Super. 110, 122-23, 797 A.2d 186 (App. Div. 2002)*. Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be "made, maintained or kept on file" by the custodian so

as to justify any relief or remedy under OPRA. *N.J.S.A. 47:1A-1.1*.

[**246] We do not view the balance of Bent's request to be a proper request for public records under OPRA. *N.J.S.A. 47:1A-5(f)* provides in pertinent part that "the custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled [***13] by the public agency," which "shall provide space for . . . a brief description of the government record sought." Here, Bent's general request for "information" neither identifies nor describes with any specificity or particularity the records sought. In his May 3, 2004, correspondence, Bent made no request for specific documents. Instead, he sought the custodian's response to his allegation of police misconduct, borne of his belief that certain unidentified and unnamed documents on file with the township were wrongfully concealed or withheld from him. For example, Bent sought "third party documents, which had been denied or withheld, and are missing from the 'entire [Stafford Police Department] file'"; and documents confirming the police department's "self interests and bad faith" as well as its "oppressive use of authority." In essence, Bent sought general information to support his unsubstantiated claim of police misconduct. Such a request neither specifically [*40] describes the documents sought, *N.J.S.A. 47:1A-5(f)*, nor seeks access to a public record, *N.J.S.A. 47:1A-1.1*. On the contrary, this open-ended demand requires analysis [***14] and evaluation which the agency is under no obligation to provide, instead of document disclosure authorized by OPRA. *See MAG Entm't, supra, 375 N.J. Super. at 546-49*. It also seeks matters "deliberative in nature, containing opinions," interpretations and "advice about agency policies," specifically exempted from disclosure under OPRA. *Gannett, supra, 379 N.J. Super. at 219. N.J.S.A. 47:1A-1.1*. We conclude, therefore, that Bent's request is not a proper request for public records under OPRA, and the information it seeks is beyond the statutory reach.

Lastly, we simply note that the only issue properly before us on appeal is the propriety of the GRC's dismissal of Bent's "denial of access" complaint. His underlying claim of police misconduct was not within the GRC's province to resolve, and thus, the GRC properly declined to address the issue. And, of course, an issue not resolved by the GRC is not properly before us on appeal. *Murphy v. Mayor Gerald Luongo, 338 N.J. Super. 260, 268, 768 A.2d 814 (App. Div. 2001)*.

The GRC correctly limited its determination to whether the information requested [***15] constituted a government record within the meaning of OPRA and whether an unlawful denial of access had occurred. The GRC's determination in this regard, involving as it does an interpretation of the statute it is charged with administering, and with which we are in substantial accord, is entitled to great weight. *In re Dist. of Liquid Assets, 168 N.J. 1, 10, 773 A.2d 6 (2001)*; *Kasper v. Teachers' Pension Ann. Fund, 164 N.J. 564, 580-81, 754 A.2d 525 (2000)*.

Affirmed.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4531-04T5

NEW JERSEY BUILDERS ASSOCIATION,

Plaintiff-Appellant,

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING, an agency of the State of New Jersey,

Defendant-Respondent.

APPROVED FOR PUBLICATION

January 24, 2007

APPELLATE DIVISION

Argued May 10, 2006* - Decided January 24, 2007

Before Judges Stern, Grall and King.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, L-2291-04.

Thomas F. Carroll, III argued the cause for appellant New Jersey Builders Association (Hill Wallack, attorneys; Mr. Carroll, on the brief).

Pamela E. Gellert, Deputy Attorney General, argued the cause for respondent New Jersey Council on Affordable Housing (Zulima V. Farber, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; Ms. Gellert, on the brief).

*Supplemental briefs were filed on October 2, 2006.

Thomas J. Cafferty argued the cause for amicus curiae New Jersey Press Association (Scarinci & Hollenbeck, attorneys; Mr. Cafferty, of counsel; Nomi I. Lowy, on the brief).

The opinion of the court was delivered by

GRALL, J.A.D.

Plaintiff New Jersey Builders Association (NJBA) filed an action in the Law Division to obtain public records held by defendant New Jersey Council on Affordable Housing (COAH), Department of Community Affairs. NJBA asserted rights of access under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law. NJBA alleged that "without any legal justification," COAH said it would provide the information beyond the seven-day deadline provided in OPRA, N.J.S.A. 47:1A-5(i).[1] Judge Feinberg dismissed NJBA's complaint after COAH produced the documents it had and created additional documents responsive to NJBA's demands for information. The judge determined that NJBA was not a prevailing party entitled to fees pursuant to N.J.S.A. 47:1A-6. NJBA appeals from the order denying its request for fees.

[1] The complaint includes a citation and reference to "OPRA," but erroneously refers to the Act as the "Open Public Meetings Act."

We granted the New Jersey Press Association (Press Association) leave to participate as amicus curiae. After oral argument, we directed NJBA to provide transcripts of the hearing that led to the dismissal of its complaint and directed both parties to provide additional briefs discussing the relevance of this court's decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), which was issued after Judge Feinberg denied NJBA's fee application. Those briefs were filed on October 2, 2006.

We hold that NJBA was not entitled to fees as a prevailing party under OPRA. N.J.S.A. 47:1A-6. Because NJBA's request did not specifically identify the documents it sought, as required by N.J.S.A. 47:1A-5(f), OPRA did not require COAH to produce the records within seven business days, N.J.S.A. 47:1A-5(i). Moreover, NJBA's request required COAH's custodian to survey COAH employees, gather responsive information and produce new documents. Because OPRA does not require an agency to perform such tasks and because NJBA needed more than ten business days to review COAH's response, COAH established that compliance within seven business days would "substantially disrupt" COAH's operations. N.J.S.A. 47:1A-5(g). Accordingly, pursuant to N.J.S.A. 47:1A-5(g), COAH was authorized to offer a "reasonable solution" – production at a later date – that accommodated the

needs of NJBA and COAH. COAH established that its response was "authorized by law," and, for that reason, NJBA was not entitled to an attorney's fee pursuant to N.J.S.A. 47:1A-6.

The essential facts are undisputed. On October 6, 2003, COAH proposed new rules for determination of fair-share housing obligations. 35 N.J.R. 4636(a). On August 16, 2004, COAH reproposed those rules. 36 N.J.R. 3691(a).

On August 19, 2004, NJBA submitted a request for government documents using a "Government Records Request Form" made available by COAH. The form provides space for "Record Request Information." COAH's form directs: "To expedite the request, be as specific as possible in describing the records being requested." In the space provided, NJBA simply referenced "Attachment 'A,'" which is a five-page document listing thirty-eight separate requests all of which include a request for "any and all documents and data." A thirty-ninth request asked COAH to advise where documents not in the possession of DCA, COAH or its consultant, Dr. Burchell, could be obtained.

NJBA's thirty-eight requests describe the documents and data sought as those "used" or "considered" by COAH or "support[ing]," "demonstrat[ing]," "justif[ying]" or "verif[ying]" various determinations relevant to COAH's determinations about fair-share housing obligations. For

example, NJBA's tenth request was for "[a]ny and all documents and data which [were] relied upon, considered, reviewed, or otherwise utilized by any employee or staff member of COAH or DCA, or by Dr. Burchell in calculating the second proposed third round affordable housing methodology and the regulations proposed on July 13, 2004 to be published in August 2004."

On August 27, 2004, within six business days of NJBA's request, COAH's "Records Custodian" responded. The custodian's response advises that NJBA's "submission" includes thirty-nine "separate requests for information," and explains that "due to the enormity of the request, COAH requires additional time with which to assess the submittal and gather the relevant information." The custodian informed NJBA that COAH could not provide the information until September 20, 2004.

NJBA notified COAH that it would agree to the September 20 date only if COAH agreed to extend the period for public comment on its proposed regulations. The last of four public hearings on COAH's proposal was scheduled for September 29, 2004, and the public comment period was scheduled to close on October 15, 2004. 36 N.J.R. 3691(a).

On September 9, 2004, NJBA commenced this action in the Law Division to enforce its rights under OPRA and the common law.

The Law Division set a briefing schedule and a return date of October 13, 2004.

By letter dated September 14, 2004, COAH responded to many of NJBA's requests. Several responses referred NJBA to materials published in "N.J.A.C. 5:94," the proposed rules, the "Comment and Response Document" and Appendices and Tables accompanying COAH's rule proposal. COAH also invited NJBA to arrange an appointment to review public comments. In other instances, COAH either provided the documents or indicated that it had no documents of the sort requested in its possession. COAH also advised that it would submit additional responsive information, which was in the possession of Dr. Burchell, by September 20, 2004.

On September 20, 2004, COAH's offices were closed due to flooding in Trenton. On September 21, 2004, Dr. Burchell's materials, which included materials he produced to respond to NJBA's information request, were sent to NJBA.

On October 6, 2004, the tenth business day after NJBA claims that it received COAH's response, NJBA asked the judge to postpone the October 13, 2004 hearing because its expert needed more time to review the materials and list "items that [NJBA] believes COAH must still respond to by October 13, 2004." That request was granted.

Five days later, on October 11, 2004, NJBA's expert identified two deficiencies and made two demands. NJBA's first demand was: "COAH must provide the research literature or statistical analyses it used to conclude that the proposed formula accurately estimates substandard housing occupied by the poor or explicitly admit that there is no basis to its formula." NJBA's second demand was similar. NJBA noted that because COAH had not made specified calculations available, "it [was] impossible to evaluate the soundness or the accuracy of its determinations." Asserting that COAH must have performed certain calculations and applied specific criteria, NJBA's expert asked for those calculations and criteria. NJBA summarized his demand: "It is anticipated that COAH has a chart, similar to its October 1993 Municipal Number Summary, that must be shared with NJBA. In the alternative, COAH should explicitly admit that it has no data or any explanation as to the manner in which it recalculated the 1987-1999 prospective need."

On October 20, 2004, COAH advised that it had not maintained any responsive documents but was enclosing a response that its consultant had prepared for NJBA. On October 25, 2004, NJBA's expert acknowledged that COAH had responded to the first request but explained why he believed that COAH's consultant

had not adequately explained the data and tables he had prepared.

On November 4, 2004, Judge Feinberg heard argument. She described NJBA's request as "extensive," "thirty-nine separate requests for information," and she found that COAH's offer to produce by September 20 was "not unreasonable." The judge questioned why NJBA had not agreed to that date. NJBA's attorney could not say how many documents NJBA had provided, noting that COAH also had provided information on disc, and did not offer an explanation for NJBA's decision to commence litigation. Although Judge Feinberg found that any delay on COAH's part was "reasonable" and found no "problems with regard to the agency's response," she gave NJBA an additional opportunity to demonstrate that COAH had not complied.

By letter dated November 17, 2004, COAH supplied additional documents created by its expert in response to a letter from NJBA dated November 10, 2004.[2] In that letter COAH explains that in an effort to resolve the dispute, COAH asked its expert to create new documents responsive to NJBA's request for information. On November 16, 19 and 24, 2004, NJBA's expert

[2] Although NJBA has submitted COAH's response, it has not supplied its letter of November 10, 2004.

complained that COAH had not provided any explanation of the numbers or the criteria it used.

On January 18, 2005, NJBA's complaint was dismissed with prejudice, a ruling which NJBA does not challenge. On January 20, 2005, NJBA moved for fees pursuant to N.J.S.A. 47:1A-6. NJBA sought an attorney's fee in the amount of $18,897 and an expert's fee in the amount of $3,052.50.

On March 4, 2005, Judge Feinberg determined that NJBA was not a prevailing party within the meaning of N.J.S.A. 47:1A-6. She found that "[f]rom a quantitative and qualitative perspective, [NJBA's] request was broad and cumbersome," COAH supplied several hundred pages of responsive documents by September 14, 2004, and the remaining responsive documents by September 21, 2004, which was one day later than COAH had promised because of the closure of State offices. Considering the "magnitude and complexity" of NJBA's request, the judge found COAH's need for "an additional twenty-four [calendar] days" reasonable and COAH's response timely and reasonable. Judge Feinberg concluded that NJBA filed its complaint in the Law Division "prematurely" and without giving "COAH a reasonable opportunity to respond."

We conclude that the denial of fees was proper. The question whether NJBA is entitled to fees pursuant to N.J.S.A.

47:1A-6 is one of statutory construction. The court's role is to determine the intent of the Legislature. See Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 216, 224 (1994). The task begins with the language of the relevant statutes, see ibid., and requires us to "consider the purpose of a statute by examining the Act in its entirety; . . . legislative history; and the common sense of the situation" in resolving any ambiguity. MCG Assocs. v. Dep't of Envtl. Prot., 278 N.J. Super. 108, 119-20 (App. Div. 1994) (citations omitted).

OPRA "was enacted in 2002 to take the place of the former Right to Know Law." Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 209 (App. Div. 2005) (citations omitted). Its "expansive definition of [government records] includes not only documents 'made, maintained or kept on file in the course of [a public agency's] official business,' but also any document 'received in the course of [the agency's] official business.'" Id. at 213 (quoting N.J.S.A. 47:1A-1.1). That definition, modified by the exemptions for records protected from disclosure, "demarks the outer limits of the statute's reach." MAG, supra, 375 N.J. Super. at 546; See Bergen County Improvement Auth. v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 509-10 (App. Div.) (noting that "the common law definition of 'public record' is broader than the

statutory definition of 'government record' contained in N.J.S.A. 47:1A-1.1" and discussing OPRA's exemptions), certif. denied, 182 N.J. 143 (2004).

OPRA provides specific procedures for requests and responses. The purpose of OPRA "is to make identifiable [non-exempt] government records 'readily accessible for inspection, copying, or examination.'" MAG, supra, 375 N.J. Super. at 546 (quoting N.J.S.A. 47:1A-1). To that end, N.J.S.A. 47:1A-5(f) requires custodians of public records to develop forms for OPRA requests that "provide space for . . . a brief description of the government record sought," and N.J.S.A. 47:1A-5(i) requires the custodian to either grant access to the record identified or deny the request "as soon as possible, but not later than seven business days after receiving the request . . . ." "Thus, OPRA requires a party requesting access to a public record to specifically describe the document sought," Gannett, supra, 379 N.J. Super. at 211-12, and it provides that if the custodian of the record "fails to respond within [the time allowed], the failure to respond shall be deemed a denial of the request . . . ." N.J.S.A. 45:1A-5(i). A person denied access may commence litigation, and, if the agency fails to prove that its conduct was authorized by law, the court must compel access.

N.J.S.A. 47:1A-6. A requestor who "prevails" is "entitled to a reasonable attorney's fee." Ibid.

OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). Research is not among the custodian's responsibilities.

OPRA does not contemplate "[w]holesale requests for general information to be analyzed, collated and compiled by the responding government entity." MAG, supra, 375 N.J. Super. at 546-49. In MAG, we reached that conclusion after considering cases decided under similar statutes of other jurisdictions, including a case in which the "Washington Supreme Court held improper a request for 'all books, records, [and] documents of

every kind' related to a specific public transportation project." See MAG, supra, 375 N.J. Super. at 547 (quoting Hangartner v. City of Seattle, 90 P.3d 26, 28 (Wash. 2004) (alterations in original)). We observed that "[f]ederal courts, considering the permissible scope of requests for government records under the Freedom of Information Act [FOIA], 5 U.S.C.A. § 522, have repeatedly held that the requested record must 'be reasonably identified as a record not as a general request for data, information and statistics . . . .'" Id. at 548 (quoting Krohn v. Dep't of Justice, 628 F.2d 195, 198 (D.C. Cir. 1980)). We held that OPRA does not compel government to review its files and analyze, collate or compile data. Id. at 549-50; see Gannett, supra, 379 N.J. Super. at 211 (questioning whether a "request for 'all information supplied to the U.S. Attorney or other federal authorities' in response to the grand jury subpoenas was a proper request for public records under OPRA").

There is an obvious connection between the specificity of the request and a custodian's ability to provide a prompt reply. The form for requests adopted by COAH explains the connection by advising the requestor as follows: "To expedite the request, be as specific as possible in describing the records being requested."

NJBA's claim of entitlement to an attorney's fee based upon allegedly untimely production highlights the relationship between a proper request and a prompt response that is critical to the purpose of OPRA. See N.J.S.A. 47:1A-1. Quite obviously, the seven-business-day rule, upon which NJBA rests its claim of denial, does not afford the custodian time to speculate about what the requestor seeks, research, survey agency employees to determine what they considered or used, or generate new documents that provide information sought. For that reason, the requestor's obligation "to specifically describe the document sought," Gannett, supra, 379 N.J. Super. at 212, is essential to the agency's obligation and ability to provide a prompt response. See MAG, supra, 375 N.J. Super. at 547 (noting that in State ex rel. Dillery v. Icsman, 750 N.E.2d 156, 159 (Ohio 2001), an attorney's fee was denied "because the request was improper due to the fact that it failed to identify the desired records with sufficient clarity").

NJBA's five-page, thirty-nine paragraph request bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for . . . a brief description of the record sought." N.J.S.A. 47:1A-5(f). Viewed from the perspective of COAH's custodian, NJBA's tenth request, quoted above, required a survey of

employees and Dr. Burchell before any attempt to compile the documents and data they "relied upon, considered, reviewed, or otherwise utilized." Rather than specifically describing the documents sought, NJBA asked COAH to select the documents and data. In short, NJBA asked COAH to identify the documents, which is NJBA's obligation under OPRA.

Descriptions of the sort NJBA gave COAH have been found inadequate by courts of other jurisdictions applying similar statutes, and this court has determined that OPRA should be applied in the same manner. See MAG, supra, 375 N.J. Super. at 546-49. Because NJBA's request is so far removed from the type of OPRA request anticipated by the Legislature, we conclude that the related provisions of OPRA, those which require timely response and provide for an award of attorney's fees when such access is denied and litigation is required, have no application here. See N.J.S.A. 47:1A-5(i); N.J.S.A. 47:1A-6.

The Press Association contends that "OPRA does not provide for an automatic extension of the time to respond to a request that an agency contends is lengthy and/or complex . . . ." We agree. Nonetheless, when a request is "complex" because it fails to specifically identify the documents sought, then that request is not "encompassed" by OPRA and OPRA's deadlines do not apply. See MAG, supra, 375 N.J. Super. at 549; see also Teeters

v. DYFS, 387 N.J. Super. 423, 425 (App. Div. 2006) (discussing an award of an attorney's fee based upon delay when the request was for "Documents from DYFS Bureau of Licensing file on the adoption agency involved") (alterations omitted).

COAH advised NJBA of the improper nature of its request when, on the sixth business day after receipt, COAH informed NJBA that it could not respond until September 20, 2004. N.J.S.A. 47:1A-5(g), (i) (requiring an explanation of the "specific basis" for denial of access and requiring a response within seven business days). The custodian explained that NJBA's request did not identify the records NJBA sought by informing NJBA that its "submission" was "39 separate requests for information" that the custodian would be required to "assess." The custodian also explained the need for a later production date by noting "the enormity of the request" and the time required "to assess the submittal and gather the relevant information." See Gannett, supra, 379 N.J. Super. at 212-13 (discussing waiver); N.J.S.A. 47:1A-5(g) (requiring indication of the "specific basis" for a denial). COAH also advised that some of the information requested was not available because it was held by Dr. Burchell. See N.J.S.A. 47:1A-5(g) (discussing unavailability when a document is in use). COAH endeavored to comply but also alerted NJBA to and did not waive defects in

NJBA's request or practical problems that required delivery on September 20, 2004. See Gannett, supra, 379 N.J. Super. at 212-13 (discussing waiver); N.J.S.A. 47:1A-5(g), (i).

We need not rest our decision in this case on NJBA's request alone. N.J.S.A. 47:1A-5 includes exceptions to the general rule that require a custodian to either "grant access . . . or deny a request . . . not later than seven business days after receiving the request." N.J.S.A. 47:1A-5(i). Those exceptions reflect the Legislature's intention to balance the requestor's interest in prompt access to identifiable records and the operational needs of government. Subsections (g) and (i) of N.J.S.A. 47:1A-5 must be read together.

In the first instance, the seven-business-day rule applies only if "the record is currently available and not in storage or archived." N.J.S.A. 47:1A-5(i).[3] "If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record." N.J.S.A. 47:1A-5(g). If it is in storage or archived,

[3] At one point in the legislative process, the bill also exempted requests for more than one hundred pages from the seven-business-day rule, but that provision was eliminated by a Senate floor amendment on May 3, 2001. See Fifth Reprint of A. 1309 (2001).

the custodian must advise the requestor within seven business days and give the requestor a date on which the record will be provided. N.J.S.A. 47:1A-5(i).[4] The date selected by the custodian then becomes the deadline for compliance. Ibid. A custodian's failure to meet the promised deadline is then deemed a denial. Ibid.

In a second instance, more pertinent to this case, "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5(g). The conduct of COAH was consistent with this exception. Within six business days of receipt of NJBA's non-complying request, COAH's custodian advised that it could not comply until September 20, 2004, because NJBA's demand required the custodian to "assess" thirty-nine requests for information and then gather the information.

Although the statute does not give any guidance on the disruptions that should be deemed "substantial" or the solutions that should be deemed "reasonable" within the meaning of

[4] The statutory provisions are not entirely clear, but N.J.S.A. 47:1A-5(g) apparently permits delay necessitated when the document is currently unavailable because it is in use.

N.J.S.A. 47:1A-5(g), there is ample evidence of both in this case.

A request that does not comply with OPRA and demands assessment and preliminary inquiry of the sort required by NJBA's demand is sufficient to give rise to an inference that compliance will "disrupt agency operations." Disruption may be inferred because a request like NJBA's necessitates work by COAH employees that is neither assigned by the agency nor envisioned by OPRA.

There is persuasive evidence of the "substantiality" of the disruption that would have followed if COAH produced the information NJBA sought within seven business days. NJBA's expert, who simply had to review what COAH provided, needed more than ten business days to identify inadequacies. NJBA asked the trial court for additional time to complete that review. NJBA does not dispute the volume of the materials COAH provided or the fact COAH created new records to provide the information NJBA sought. We conclude that the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to survey employees, identify information and generate new records and the requestor's need for more than ten business days to review what the agency provided.

We also conclude that COAH's promise to supply the materials by September 20, 2004, which COAH honored one day late due to a closure of government offices in Trenton beyond COAH's control, was a "reasonable solution" that accommodated the interests of both NJBA and COAH. N.J.S.A. 47:1A-5(g).[5] NJBA contends that COAH's solution did not accommodate NJBA's needs because COAH did not agree to extend the comment period on its proposed regulations. NJBA filed its request on August 19, 2004, and COAH offered to respond by September 20, 2004. COAH's comment period did not close until October 15, 2004. Thus, the time NJBA had for review and comment was nearly equivalent to the time COAH had to identify, gather, generate and produce the information NJBA had requested. That solution reasonably accommodated the competing interests. More important, a requestor's status in separate proceedings neither diminishes nor expands the requestor's right of access to government records under OPRA. MAG, supra, 375 N.J. Super. at 543-46.

N.J.S.A. 47:1A-5(c), which provides for the imposition of a special service charge when accommodation of a request "involves an extraordinary expenditure of time and effort," cannot be read to compel COAH's custodian to comply with NJBA's demand within

[5] NJBA does not challenge COAH's representation that all documents provided after September 21 were generated in order to provide information NJBA requested.

seven business days by charging a "service fee" to recoup extraordinary expenses for necessary labor. NJBA and the Press Association suggest that reading. The "service charge" authorized in subsection (c) of N.J.S.A. 47:1A-5 is one solution to a labor intensive demand but not the only solution. Subsection (g) of N.J.S.A. 47:1A-5 authorizes custodians to propose a broad range of "reasonable solutions" that accommodate competing interests when compliance would substantially disrupt agency operations.

We also reject the argument that the Legislature's failure to include a specific reference to operationally disruptive requests in subsection (i) of N.J.S.A. 47:1A-5, which states the seven-business-day rule and addresses extensions of time permitted when documents are archived or stored, precludes an extension necessitated by an operationally disruptive OPRA request. Subsection (g) of N.J.S.A. 47:1A-5 clearly permits outright denial of these requests after an attempt to reach a reasonable and mutually accommodating solution. OPRA's purpose is both to provide access to government records and to provide it promptly. N.J.S.A. 47:1A-1. Common sense precludes an assumption that the Legislature would intend to permit denial but prohibit reasonable solutions that involve brief delay.

Accordingly, the information before the Law Division was adequate to permit a finding that COAH met its burden of proof; COAH established that its failure to supply these documents within seven business days was authorized by law and not an improper "denial" of access under OPRA. See N.J.S.A. 47:1A-6. NJBA's request was not one that permitted a ready response by a custodian of records, which is what OPRA contemplates. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5. Moreover, COAH's response was consistent with and authorized by N.J.S.A. 47:1A-5(g).

Federal courts addressing non-compliance with deadlines included in the FOIA may grant extensions when "the agency has been diligently working on the request, but has been unable to meet the deadline due to exceptional circumstances . . . ." See Morrow v. FBI, 2 F.3d 642, 644 (5th Cir. 1993) (applying 5 U.S.C.A. § 552(a)(6)(C)). Exceptional circumstances have been found when "the volume of requests for information [are] vastly in excess of that anticipated by Congress." Ibid. (and cases cited therein). While the New Jersey Legislature did not include the same exceptional circumstances rule in OPRA, OPRA's exception based on substantial disruption is analogous. We hold that N.J.S.A. 47:1A-5(g) permits consideration of demands on agency operations imposed by the document request at issue.

There is no question that a delay in providing records in response to a proper OPRA request may amount to a denial of access under OPRA and entitle a person denied access to "prevail" if the agency does not establish that the delay is authorized by law. N.J.S.A. 47:1A-6; see Teeters, supra, 378 N.J. Super. at 430-35. Because COAH established that this delay was authorized by law, we need not consider whether NJBA could have been deemed to "prevail" if the delay were unauthorized. We note that COAH provided all documents, other than those that Dr. Burchell generated to address NJBA's demand, on a date consistent with a promise of delivery it made prior to commencement of this litigation. Nor is it necessary to consider whether the attorney's fee NJBA seeks is reasonable or whether OPRA, which is designed to permit ready access to records the requestor has identified, permits an award of a fee to an expert retained to review documents an agency has provided.

The Press Association argues that a general reasonableness standard for timely compliance is inconsistent with and will undermine the seven-business-day rule adopted by the Legislature. This decision does not replace the seven-business-day rule with a general reasonableness standard. That is a matter for the Legislature. We simply hold that NJBA's request

was not encompassed by OPRA, and COAH offered a reasonable solution given the substantial operational disruption posed by that request.

Affirmed.

MAG ENTERTAINMENT, LLC, Plaintiff/Respondent, v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL, Defendant/Appellant.

DOCKET NO. A-0128-04T5

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

375 N.J. Super. 534; 868 A.2d 1067; 2005 N.J. Super. LEXIS 72

February 1, 2005, Argued
March 7, 2005, Decided

SUBSEQUENT HISTORY: [***1] Approved for Publication March 7, 2005.

PRIOR HISTORY: On appeal from an Order of the Superior Court of New Jersey, Law Division, Civil Part, Mercer County, Docket No. L-2766-03.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant division of alcoholic beverage control (ABC) brought an interlocutory appeal of an order from the Superior Court of New Jersey at Mercer County (New Jersey), which granted respondent entertainment company the right under the Open Public Records Act (OPRA), *N.J. Stat. Ann. § § 47:1A-1* to -13, to obtain documents from the ABC that were previously denied during discovery in the ABC's separate pending enforcement action against the company.

OVERVIEW: The ABC filed an administrative enforcement action to revoke the company's liquor license for, among other things, serving alcohol to an intoxicated patron who was involved in a fatal car accident. The company's discovery request for documents regarding the ABC's handling of other actions against similarly situated liquor licensees was eventually denied as overbroad. The company's subsequent OPRA request for the same information was denied. While the enforcement action was pending, the company filed a complaint under *N.J. Stat. Ann. § 47:1A-6* for compliance with the OPRA request. The lower court issued an order compelling the deposition of an ABC official and for production of records. The enforcement action was stayed pending the ABC's interlocutory appeal of that order. The court found that the OPRA request was improperly granted since it was overly broad and it failed to specifically identify the particular governmental records sought. The company used OPRA as an alternative to obtaining information that it could not get through discovery. Finally, the mandated procedure was neither summary nor expeditious. The OPRA request was improperly granted.

OUTCOME: The court vacated the order and remanded for dismissal of the company's OPRA action.

LexisNexis(R) Headnotes

COUNSEL: Eileen Schlindwein Den Bleyker, Deputy Attorney General, argued the cause for appellant (Peter C. Harvey, Attorney General of New Jersey, attorney; Patrick De Almeida, Assistant Attorney General, of counsel; Ms. Schlindwein Den Bleyker, on the brief).

Paul Colwell argued the cause for respondent (Wolff & Samson, attorneys; Mr. Colwell, of counsel; Maria Anastasia and Mr. Colwell, on the brief).

JUDGES: Before Judges Skillman, Parrillo and Riva. The opinion of the court was delivered by PARRILLO, J.A.D.

OPINIONBY: PARRILLO

OPINION: [*539] [**1069] The opinion of the court was delivered by

PARRILLO, J.A.D.

In this interlocutory appeal, we consider whether a request under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to - 13*, for information for use in collateral administrative proceedings with the governmental entity required to respond to the OPRA request was proper. Specifically, we granted leave to review an order of the Law Division: (1) granting plaintiff, MAG Entertainment, [***2] LLC (MAG), the right, under OPRA, to obtain documents from defendant, the Division of Alcoholic Beverage Control (Division or ABC), which were previously denied during discovery in the agency's pending enforcement [**1070] action against MAG; and (2) compelling the deposition of an agency representative in furtherance of document production. We now reverse.

In October 2001, the Division filed administrative charges seeking to revoke MAG's plenary retail liquor license for allegedly serving alcohol to an intoxicated patron, who was then involved in a fatal car accident, and for alleged acts of "lewdness" by female dancers. In January, 2003, in the enforcement proceeding pending in the Office of Administrative Law (OAL), MAG requested documents and records regarding the Division's handling of other enforcement actions against similarly situated liquor licensees in order to potentially pursue a selective enforcement defense. When the Division refused to disclose this information, MAG filed a motion to compel discovery, which was granted by the administrative law judge (ALJ) in June, 2003. The Division appealed that decision and, in July, 2003, the ABC Director reversed on the ground that the [***3] discovery demand was burdensome and would require the agency to "undertake an extensive search of its records."

Rather than seeking interlocutory review here, *Rule 2:2-4*, MAG filed a request under OPRA for "all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident," and "all documents [*540] or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." MAG's request did not identify any specific case by name, date, docket number or any other citation, but instead demanded that:

> The documents or records should set forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including [***4] all witnesses and counsel, and copies of all pleadings, interrogatory answers, case documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations.

On October 3, 2003, the Division's records custodian rejected MAG's request, deeming it a "[general] request for information" obtained through research, rather than a "request for a specific record." She further explained that the request was not limited to a particular time frame, thus necessitating a search of both open and closed Division files. More significantly, since the agency's case tracking system did not have a search engine that could readily extract a list of cases that fit MAG's request, the custodian would have to manually review the contents of every Division case file to determine the factual basis for the charges brought, and their disposition. In other words, MAG's request required the custodian to collect, evaluate, and compile information from each file and amounted, in effect, to an improper demand for research.

Consequently, on October 27, 2003, while the enforcement action was still pending in the OAL, MAG appealed [***5] the denial of its request to the Law Division by way of order to show cause and verified complaint pursuant to *N.J.S.A. 47:1A-6*. Prior to the return date, and in connection with its OPRA request, on December 10, 2003, MAG served the Division with a notice to [**1071] take the oral depositions of both an Assistant Attorney General in charge of the ABC's Enforcement Bureau and a Deputy Attorney General previously assigned to the agency. The deposition notice also demanded the production of all documents related to the matter. Immediately thereafter, the Division filed its answer to the show [*541] cause order, denying the allegations and asserting various defenses, most notably lack of jurisdiction and failure to exhaust administrative remedies. On January 2, 2004, the Division also filed a notice of motion for a protective order quashing the depositions, pursuant to *Rule 4:10-3*.

At the hearing on the return date, January 9, 2004, the Division maintained that MAG's request was untenable due to its scope and the type and amount of work it required, and that, in any event, depositions were not the appropriate means of narrowing the request. [***6] MAG argued, to the contrary, that depositions would be an effective way to identify the relevant case files and the pertinent information therein that it was seeking under OPRA. The motion judge did not rule on the matter, but rather ordered the parties to "honestly talk to each other... and see if you [can] define the object of your inquiry, if there's some reasonable ways to do that."

As a result of this directive, the parties undertook settlement discussions. Over the course of the negotiations, the Division identified three cases that involved the sale of alcohol to an intoxicated patron who then caused a fatal motor vehicle accident and approximately 296 cases involving lewdness charges. n1 Nevertheless, despite this effort and the passage of seven months, no settlement was reached because the parties disagreed over which contents were privileged or otherwise exempted from OPRA's reach.

n1 A dispute subsequently arose over the exact meaning of this representation. The Division claims it was able to identify these cases by treating the negotiations as a modified OPRA request, in which MAG limited the scope of records it sought by only asking for cases from 1990 to the present. On the other hand, MAG asserts that it agreed to no such qualification and considers the Division's representation responsive to its original OPRA request. As such, MAG claims the identified cases constitute all the relevant information being sought.

[***7]

Consequently, another hearing was held on July 30, 2004, at which time the Division objected to blanket production, claiming application of a number of exemptions within OPRA, and citing [*542] the fact that the case files contained documents, such as criminal investigatory records, settlement negotiations, legal research, counsel's draft documents, and records of correspondence, that were not subject to disclosure. The Division also maintained that selective disclosure of the charges and depositions of all 300 cases would obviate the purported need for depositions of agency officials since MAG could not properly question either attorney about any other information in the files. MAG argued in response that it was not interested in the mental impression of the deponents, but only in the precise contents of the case files, and that depositions were necessary to identify with more specificity the documents, such as hearing transcripts, OAL decisions, reports and recommendations, and pleadings, that were disclosable. Without an *in-camera* inspection of documents, and without findings on the Division's claims of privilege and exemptions, the court, by order of August 26, 2004, denied the agency's [***8] request for a protective order and allowed the deposition of the Assistant Attorney General in order "to move this thing along." However, the court limited the deposition "to an understanding of what these files are comprised [**1072] of, with particularity, limited to how they're maintained, what type of disposition is made of materials once the case is over." As for which documents must be made available, the motion judge stated, ". . . it seems to me that the charges and dispositions certainly should be made available. Whether there is more that's made available will be subject to the deposition and the sharpening of the focus that has to come about in this case." In other words, the judge allowed MAG to depose an agency official for the purpose of more clearly refining its OPRA request and obtaining documents for use in a collateral OAL proceeding in which the Division was the adverse party, seeking revocation of MAG's liquor license. We granted a stay of the trial court's order pending disposition of the Division's interlocutory appeal. The administrative enforcement action remains pending in the OAL.

[*543] We review *de novo* the issue of whether access to public records under OPRA and the [***9] manner of its effectuation are warranted. We are satisfied that on the basis of this admittedly sparse record, the Law Division's broad disclosure order compelling the deposition of the agency official was clearly erroneous.

As a threshold matter, we first consider the interplay between OPRA and our discovery rules. No one disputes that MAG's OPRA request relates to issues in the ABC's collateral enforcement action pending in the OAL, and to documents for use in connection with that administrative proceeding. Although the purpose or motive for which information is sought is generally immaterial to the disclosure determination under OPRA, here the manner in which MAG attempted to use OPRA as a vehicle to transfer management of the discovery process in the administrative proceeding from the ALJ to the Law Division was patently improper.

New Jersey provides access to public records in three distinct ways, through the citizen's common law right of access, OPRA, and the discovery procedures applicable to civil disputes. *Bergen County Improvement Auth. v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 515, 851 A.2d 731 (App. Div.),* certif. denied, *182 N.J. 143, 861 A.2d 847 (2004).* [***10] Records that are not available under one approach may be available through another. For example,

in *Bergen County Improvement Authority, supra,* we recognized that the common law definition of "public records" was broader than OPRA's definition of "government records," and therefore, a litigant might be able to obtain documents through the common law that it could not obtain through OPRA. *370 N.J. Super. at 510.* Likewise, in *Mid-Atlantic Recycling Technologies, Inc. v. City of Vineland, 222 F.R.D. 81, 85 (D.N.J. 2004),* the court held that federal discovery rules governing plaintiff's civil lawsuit against municipal defendants did not preclude plaintiff from requesting documents under OPRA even though plaintiff might obtain documents from defendants more [*544] quickly through OPRA and otherwise unobtainable under the federal rules.

Unlike the limits and restrictions that a court may impose on the scope of discovery under our court rules, *see e.g., Rule 4:10-3*; *Isetts v. Borough of Roseland, 364 N.J. Super. 247, 262-63, 835 A.2d 330 (App. Div. 2003),* OPRA embodies the public policy [***11] of New Jersey that:

> government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access . . . .
>
> [**1073] [*N.J.S.A. 47:1A-1.*]

Under OPRA, as under its predecessor statute, the Right to Know Law, *N.J.S.A. 47:1A-2 to -4*, repealed by L. 2001, c. 404, n2 the Legislature continued "the State's longstanding public policy favoring ready access to most public records." *Serrano v. South Brunswick Tp., 358 N.J. Super. 352, 363, 817 A.2d 1004 (App. Div. 2003).* As we noted in *Serrano,* in examining case law under the prior Right to Know Law, "New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry." *Ibid.* (quoting *South Jersey Pub. Co. v. New Jersey Expwy. Auth., 124 N.J. 478, 486-87, 591 A.2d 921 (1991)).* Thus, *N.J.S.A. 47:1A-1* specifically provides [***12] that "all government records shall be subject to public access unless exempt." Furthermore, the custodian of the government record has the burden of proving that the denial of access is authorized by law. *N.J.S.A. 47:1A-6.*

> n2 In replacing the Right to Know Law with OPRA by L. 2001, c. 404, the Legislature retained much of the original statement of legislative purpose and findings, *N.J.S.A. 47:1A-1. See Hartz Mountain Indus., Inc. v. New Jersey Sports & Expo. Auth., 369 N.J. Super. 175, 183, n. 2, 848 A.2d 793 (App. Div.), certif. denied, 182 N.J. 147, 182 N.J. 147, 862 A.2d 56 (2004).*

The fact that litigation was pending between the ABC and MAG when MAG made its public records request does not, in itself, relieve the government agency of its obligation to comply with OPRA. *See Mid-Atlantic Recycling Tech., supra, 222* [*545] *F.R.D. at 85.* Documents that are "governmental records" and subject to public access under OPRA are no less subject [***13] to public access because the requesting party is opposing the public entity in possession of material sought in collateral litigation. *Ibid.*; *see also County of Los Angeles v. Superior Court, 82 Cal. App. 4th 819, 98 Cal. Rptr. 2d 564 (Cal. Ct. App. 2000)* (holding that a plaintiff who had filed suit against a state agency could file a request under California's open records act to obtain documents for use in its civil action even though a request for these same records had been denied in the collateral proceeding). There is no blanket exception carved out to the requirement of disclosure when the public records sought are germane to pending litigation between the requestor and the public entity. *Cf. Bolm v. Custodian of Records of Tucson Police Dep't, 193 Ariz. 35, 969 P.2d 200 (Ariz. Ct. App. 1998)* (fact of pending litigation when public records request was made does not affect public agency's obligation to comply with Arizona's public records law). As we previously held in *Hartz Mountain, supra,* it is appropriate for the Law Division to entertain the OPRA application "even if the denied OPRA request is made in connection [***14] with a proceeding pending before a state administrative agency whose final decisions are reviewable in the Appellate Division." *369 N.J. Super. at 182-83.* Simply put, the right to inspect and copy governmental records under OPRA is without limitation as to the reasons for which the access is undertaken. A party's right to access public records is not abridged because it may be involved in other litigation with the governmental agency required to respond to the OPRA request.

By parity of reasoning, that the information requested is necessary to properly resolve related civil proceedings pending between the parties is of no moment. OPRA is a public disclosure statute and is not intended to replace or supplement the discovery of private litigants. Its purpose is to inform the public about agency action, not necessarily to

benefit [**1074] private litigants. That is, a party's status as a litigant does not enlarge its access to public records under OPRA. The private needs of the requesting party [*546] for information in connection with collateral proceedings play no part in whether the request is proper or whether the disclosure is warranted.

To this end, OPRA's definition of "government [***15] record" demarks the outer limits of the statute's reach. Importantly, OPRA limits its definition of "government record" to:

> any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of . . . official business . . . or that has been received in the course of . . . official business . . .
>
> [*N.J.S.A. 47:1A-1.1.*]

Moreover, it affirmatively excludes from such definition twenty-one separate categories of information, *N.J.S.A. 47:1A-1.1*, thereby "significantly reducing the universe of publicly-accessible information." *Bergen County Improvement Auth., supra, 370 N.J. Super. at 516-17.*

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply [***16] operates to make identifiable government records "readily accessible for inspection, copying, or examination." *N.J.S.A. 47:1A-1*. Even then, inspection is subject to reasonable controls, and courts have inherent power to prevent abuse and protect the public officials involved. *See DeLia v. Kiernan, 119 N.J. Super. 581, 585, 293 A.2d 197 (App. Div.)*, certif. denied, *62 N.J. 74, 299 A.2d 72 (1972)*. In fact, if a request would substantially disrupt agency operations, the custodian may deny it and attempt to reach a reasonable solution that accommodates the interests of the requestor and the agency. *N.J.S.A. 47:1A-5(g)*.

On this score, the Government Records Council (Council), the administrative body charged with adjudicating OPRA disputes, *N.J.S.A. 47:1A-6*, has explained that "OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in [*547] the custodian's possession." *Reda v. Tp. of West Milford*, GRC Complaint No. 2002-58 (January 17, 2003). There, an individual sought information regarding a municipality's [***17] liability settlements but did not request any specific record. *Ibid.* In rejecting the request, the Council noted that OPRA only allows requests for records, not requests for information, and therefore, it is "incumbent on the requestor to perform any correlations and analysis he may desire." *Ibid*.

Other jurisdictions, in interpreting their own freedom of information laws have reached similar results. For example, in *Capitol Information Ass'n v. Ann Arbor Police, 138 Mich. App. 655, 360 N.W. 2d 262, 263 (Mich. Ct. App. 1985)*, the court upheld the denial of a plaintiff's request for public records that included "all correspondence with all federal law enforcement/investigative agencies . . . that pertain to persons living in Ann Arbor, Michigan . . . ." Even though the request was confined to a relatively short period of time, the court characterized it as "absurdly overbroad" and explained that "plaintiff had to request specific identifiable records; it failed to do so here." *Id. at 264.*

[**1075] Likewise, in *Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26, 28 (Wash. 2004)*, the Washington Supreme Court held improper a request for "all [***18] books, records, [and] documents of every kind" related to a specific public transportation project. Finding the request overbroad, the court reasoned that the state's public disclosure act "was not enacted to facilitate unbridled searches of an agency's property." *Id. at 30*. Accordingly, a proper request under the act must "identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents." *Ibid. See also State ex rel Dillery v. Icsman, 92 Ohio St. 3d 312, 2001 Ohio 193, 750 N.E. 2d 156 (Ohio 2001)* (denying attorney's fees related to plaintiff's public records request because the request was improper due to the fact that it failed to identify the desired records with sufficient clarity).

[*548] In *Bader v. Bove, 273 A.D.2d 466, 710 N.Y.S. 2d 379 (N.Y. App. Div.), leave to appeal denied, 95 N.Y.2d 764, 739 N.E.2d 294, 716 N.Y.S.2d 38 (N.Y. 2000)*, property owners sought access, under New York's freedom of information law, to all records related to the adoption or revision of a village zoning code's prohibition of commercial activity. The Appellate Division affirmed the lower court's [***19] denial of the petition as overbroad and burdensome,

inasmuch as it would require the village clerk to manually search through every document filed with the village for the past 45 years. Similarly in *In Re Gannett Co. v. James, 86 A.D.2d 744, 447 N.Y.S.2d 781 (N.Y. App. Div.), leave to appeal denied, 56 N.Y.2d 502 (N.Y. 1982)*, the court denied the petitioner's request for all complaints made to the internal affairs division of the Rochester Police Department alleging harassment or use of force by police officers for the past two years since the Civil Service Commission, which does not maintain separate files for police disciplinary proceedings, would have had to go through every employee's file and *compile* the information.

Federal courts, considering the permissible scope of requests for government records under the Freedom of Information Act, *5 U.S.C.A § 552*, have repeatedly held that the requested record must "be reasonably identified as a record not as a general request for data, information and statistics . . . ." *Krohn v. Dep't of Justice, 202 U.S. App. D.C. 195, 628 F. 2d 195, 198 (D.C. Cir. 1980)*; [***20] *see also Borom v. Crawford, 651 F. 2d 500, 501-02 (7th Cir. 1981)*; *Hudgins v. Internal Revenue Serv., 620 F. Supp. 19, 21 (D.D.C. 1985)*, aff'd *257 U.S. App. D.C. 242, 808 F.2d 137 (D.C. Cir. 1987), appeal dismissed, cert. denied, 484 U.S. 803, 108 S. Ct. 47, 98 L. Ed. 2d 12 (1987)*. For example, in *Krohn, supra*, a request for "sentencing statistics" was "fatally flawed" because it was "so broad and general as to require the agency to review the entire record of 'each and every . . . criminal case' in order to determine whether it contained any evidence of the data, information or statistics that appellant requested." *628 F. 2d at 197-98*. Extending this reasoning even further, the court in *Borom, supra*, rejected a requestor's argument that the government could not avoid disclosure of information it possessed merely because its [*549] record-keeping systems did not compile and store the information in the precise form in which it was requested. *651 F. 2d at 501*. There, the requestor sought information regarding the parole or early release of black and white federal prisoners, but the Parole [***21] Commission's data systems did not collate information based on race. *Ibid.* Affirming a grant of summary judgment in favor of the government, the court reiterated the rationale espoused in *Krohn.Id. at 502. But see Ferri v. Bell, 645 F. 2d 1213 (3rd Cir. 1981)* (holding that request under [**1076] FOIA could not be rejected in toto simply because compliance would require more work than merely referring to a general index).

We do not interpret OPRA any differently. Under OPRA, agencies are required to disclose only "identifiable" governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files.

Here, the Law Division judge failed to apply these governing principles and, therefore, erred in granting MAG's OPRA request. Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted [***22] by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted. Simply put, the Division was asked to do the very research and investigation MAG needed to do in the administrative proceeding in order to establish a "colorable claim" of selective enforcement before being entitled [*550] to pre-trial discovery as to its defense in that forum. *State v. Ballard, 331 N.J. Super. 529, 752 A.2d 735 (App. Div. 2000)*; *State v. Smith, 306 N.J. Super. 370, 703 A.2d 954 (App. Div. 1997)*; *State v. Kennedy, 247 N.J. Super. 21, 588 A.2d 834 (App. Div. 1991)*. Having failed to make any threshold showing in the OAL, MAG employed OPRA as an alternative to civil discovery, to obtain information previously denied in the enforcement action. [***23] While OPRA may provide access to governmental records otherwise unavailable, MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit.

But even if MAG's OPRA request may be viewed as one properly for governmental records, the manner in which the Law Division judge tried to effectuate access was patently erroneous. Obviously recognizing the sheer breadth and scope of MAG's request, the court compelled the deposition of a Division representative in order to better manage, refine, and narrow the search. Of course, the perceived need for such extraneous aid only serves to highlight the impropriety of MAG's request in the first instance. By ordering the deposition of an agency official, the court compounded the error, not only implicating a host of other concerns, *see, e.g., Federal Trade Commission v. Grolier, Inc., 462 U.S. 19, 30, 103 S. Ct. 2209, 2216, 76 L. Ed. 2d 387 (1983)* (Brennan, J., concurring); *Kerr v. Able Sanitary & Envtl. Servs., 295 N.J. Super. 147, 158-59, 684 A.2d 961 (App. Div. 1996)*, but also [***24] far exceeding the limited relief and summary procedures afforded under the statute.

Without question, proceedings under OPRA are to be conducted in a "summary or expedited manner." *N.J.S.A. 47:1A-6*; *Hartz Mountain, supra, 369 N.J. Super. at 185*; *Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 378, 817 A.2d 1017 (App. Div. 2003)*. This means that a [**1077] trial court is to proceed under the procedures prescribed in Rule 4:67. *R. 4:67-1(a)*. The action is commenced by an order to [*551] show cause supported by a verified complaint, and at an initial hearing, if the court is "satisfied with the sufficiency of the application, [it] shall order the defendant to show cause why final judgment should not be rendered for the relief sought." *Ibid*; *R. 4:67-2(a)*. The court must try the case at the return date of the order to show cause "or on such short day as it fixes." *R. 4:67-5*; *Courier News, supra, 358 N.J. Super. at 378.*

In a proceeding conducted under *Rule 4:67-5* [***25] , a court must make findings of fact, either by adopting the uncontested facts in the pleadings after concluding that there are no genuine issues of fact in dispute, or by conducting an evidentiary hearing. *Id. at 378-79.* For instance, in an OPRA action, as here, the court is obliged when a claim of confidentiality or privilege is made by the public custodian of the record, to inspect the challenged document *in-camera* to determine the viability of the claim. *Hartz Mountain, supra, 369 N.J. Super. at 183*; *see also Loigman v. Kimmelman, 102 N.J. 98, 505 A.2d 958 (1986)*. "That inspection implies the necessity of recorded factfinding by the trial judge as well as the opportunity of the parties to address general principles relative to the claim of confidentiality and privilege, as well, perhaps, an opportunity to the government custodian to argue specifically, as part of the *in-camera* review, why the document should be deemed privileged or confidential or otherwise exempt from the access obligation." *Hartz Mountain, supra, 369 N.J. Super. at 183*.

Of course, these procedures must be conducted in an expedited [***26] manner. Summary actions are, by definition, short, concise, and immediate, and further, are "designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment." *Depos v. Depos, 307 N.J. Super. 396, 399, 704 A.2d 1049 (Ch. Div. 1997)* (quoting *Perretti v. Ran-Dav's County Kosher, 289 N.J. Super. 618, 623, 674 A.2d 647 (App. Div. 1996))*. Unlike *Rule 4:67-2(b)*, which allows for conversion of a plenary action into a summary action, and, therefore, may require an elaborated record, *Rule 4:67-2(a)*, which [*552] governs OPRA actions, does not permit the record to be supplemented by depositions or other forms of discovery. In other words, Rule 4:67 distinguishes between those actions permitted to proceed in a summary manner by rule or statute, as is the case here, and actions that may be converted from plenary actions into summary actions. *See Taylor v. Ford Motor Co., 703 F.2d 738, 742-43 (3rd Cir. 1983)*. While the latter specifically contemplate depositions, such protracted discovery is simply not suitable, [***27] and, absent legitimate need, is not permissible in actions, like OPRA proceedings, that are inherently summary by nature and expedited in manner. n3

n3 To be sure, in certain instances, depositions may be proper in actions brought pursuant to *Rule 4:67-1(a)*. Significantly, *Rule 4:67-5* allows the court, for good cause shown, to order that an action proceed as in a plenary action. Here, however, MAG never made such a motion, nor did the judge find good cause to convert the action into a plenary proceeding.

Yet, the unorthodox procedure invoked in this case was neither summary nor expeditious. Quite the contrary, the hearing at which the agency official's deposition was ordered occurred seven months after MAG's OPRA application was filed. By then, although the Division had posed a [**1078] number of objections to the request, the court had not undertaken an *in-camera* inspection of any documents or passed on any of the agency's claims of privilege, [***28] confidentiality, or exemption. Instead, after the passage of so much time, the court took the preliminary step of ordering the official's deposition. Even though presumably only to index the contents of the 300 case files previously identified by the Division, this extraordinary measure was not only beyond the limited scope of the summary hearing and, therefore, impermissible, but it was also totally unnecessary. The Division's own regulations specify precisely what documents are required to be maintained in its files in the course of official business, *N.J.A.C. 13:2-29.1*. Thus, no legitimate purpose is served by having an agency official reiterate that which agency rules clearly prescribe. Moreover, even assuming so innocuous a purpose, this "access" device nevertheless runs [*553] the risk of infringing on protected areas, generating further judicial involvement, and prolonging this already burdensome and protracted litigation. What is starkly obvious is that OPRA has been employed here to circumvent the discovery process in the collateral administrative proceeding.

We are of the view that there must be closure to this matter, especially since the Division's [***29] enforcement action against MAG, filed over two years ago, has been stayed pending resolution of this interlocutory appeal. Because

we find that the Division was not required to comply with MAG's invalid OPRA request, we vacate the order of August 25, 2004, compelling the agency official's deposition, and direct the Law Division on remand, to dismiss the matter.

Reversed and remanded.

Government Records Council

OPRA EXEMPTIONS

N.J.S.A. 47:1A-1.1

1) Inter-agency or intra-agency advisory, consultative or deliberative material

2) Legislative records

3) Law enforcement records:
   a. Medical examiner photos
   b. Criminal investigatory records (however, N.J.S.A. 47:1A-3.b. lists specific criminal investigatory information which must be disclosed)
   c. Victims' records

4) Trade secrets and proprietary commercial or financial information

5) Any record within the attorney-client privilege

6) Administrative or technical information regarding computer hardware, software and networks which, if disclosed would jeopardize computer security

7) 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

8) Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software

9) Information which, if disclosed, would give an advantage to competitors or bidders

10) Information generated by or on behalf of public employers or public employees in connection with:
   a. Any sexual harassment complaint filed with a public employer
   b. Any grievance filed by or against an employee
   c. Collective negotiations documents and statements of strategy or negotiating

11) Information that is a communication between a public agency and its insurance carrier, administrative service organization or risk management office

12) Information that is to be kept confidential pursuant to court order

13) Certificate of honorable discharge issued by the United States government (Form DD-214) filed with a public agency

14) Social security numbers

15) Credit card numbers

16) Unlisted telephone numbers

17) Drivers' license numbers

18) Certain records of higher education institutions:
   a. Research records
   b. Questions or scores for exam for employment or academics
   c. Charitable contribution information
   d. Rare book collections gifted for limited access
   e. Admission applications
   f. Student records, grievances or disciplinary proceedings revealing a students' identification

N.J.S.A. 47:1A-1.2

19) Biotechnology trade secrets

N.J.S.A. 47:1A-2.2

20) Convicts requesting their victims' records

N.J.S.A. 47:1A-3.a.

21) Ongoing investigations of non-law enforcement agencies (must prove disclosure is inimical to the public interest)

N.J.S.A. 47:1A-5.k.

22) Public defender records

N.J.S.A. 47:1A-9

23) Upholds exemptions contained in other State or federal statutes and regulations, Executive Orders, Rules of Court, and privileges created by State Constitution, statute, court rule or judicial case law

N.J.S.A. 47:1A-10

24) Personnel and pension records, except specific information identified as follows:
   a. An individual's name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received
   b. When authorized by an individual in interest

c. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information

N.J.S.A. 47:1A-1 (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."

Burnette v. County of Bergen, 198 N.J. 408 (2009). Without ambiguity, the court held that the privacy provision "is neither a preface nor a preamble." Rather, "the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation." "Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests."

Executive Order No. 21 (McGreevey 2002)

1) Records where inspection, examination or copying would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

2) Records exempted from disclosure by State agencies' proposed rules are exempt from disclosure by this Order.

Executive Order No. 26 (McGreevey 2002)

1) Certain records maintained by the Office of the Governor

2) Resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing

3) Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments

4) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation

5) Information in a personal income or other tax return

6) Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed

7) Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing

8) Records in the possession of another department (including NJ Office of Information Technology or State Archives) when those records are made confidential by regulation or EO 9.

Government
Records Council

SPECIAL SERVICE CHARGE
14-POINT ANALYSIS

Whenever a records custodian asserts that fulfilling an OPRA records request requires an "extraordinary" expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

> "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* …" (Emphasis added.) N.J.S.A. 47:1A-5.c.

For the Government Records Council to determine (1) whether a special service charge is warranted and (2) whether the special service charge the custodian assessed is reasonable, the Custodian must provide answers to the following questions:

1. What records are requested?

2. Give a general nature description and number of the government records requested.

3. What is the period of time over which the records extend?

4. Are some or all of the records sought archived or in storage?

5. What is the size of the agency (total number of employees)?

6. What is the number of employees available to accommodate the records request?

7. To what extent do the requested records have to be redacted?

8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?

9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?

10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?

11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?

13. What is the availability of information technology and copying capabilities?

14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.