

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



ATLANTIC COUNTY
MUNICIPAL JOINT INSURANCE FUND (ACMJIF)
Annual Retreat: October 27th & 28th, 2021



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Who is the “Custodian of a Government Record”?

OPRA provides that the custodian of government records in a municipality is the Municipal Clerk. OPRA does not preclude a municipality from developing reasonable and practical measures for responding to OPRA requests which may include designating deputy custodians for particular types of records.

Whomever is designated as the “Custodian” should familiarize themselves with the Government Records Council (GRC) website (www.nj.gov/grc/custodians/). As the “custodian”, it is the Municipal Clerk’s responsibility to obtain and organize any and all documents that are responsive to an OPRA request.



OPRA Requests Seeking Claims Information

- It is my recommendation that Municipal Clerks that receive an OPRA request seeking documents pertaining to an ongoing or closed lawsuit or requesting other claims information, should follow the recommended procedures set forth in the revised draft of the Policy regarding responses to OPRA Requests. I will be recommending to the Fund that this Revised OPRA Policy be adopted.

Revised Policy

A copy of the draft of the revised Policy is included in your Retreat Binder.



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

Revised Policy cont.

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

Revised Policy cont.

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

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

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

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

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

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



Requests for Communications

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

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

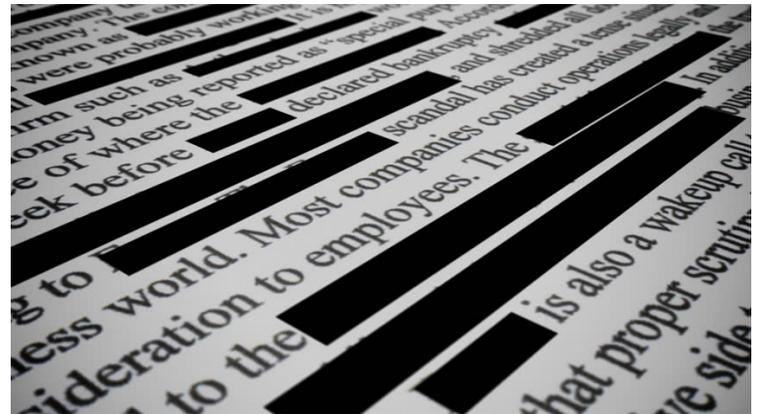
Redacting Government Records:

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

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

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

When redactions are made, the custodian must explain the reason for the redaction and the custodian has the responsibility to provide a reasonable explanation.



Are there records that are subject to immediate release?

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

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

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

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



Body Worn Cameras (BWC)

The New Jersey Legislature mandated universal Body Worn Camera (BWC) implementation with the passage of P.L. 2020, c. 128 and 129. These two new laws now require the use of BWC by all “uniformed patrol officers” in the course of their duties, and provide the basic framework for the operation of BWCs and the handling of BWC footage.

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



Body Worn Cameras (BWC) cont.

The New Jersey Attorney General, on May 25, 2021 issued Attorney General Law Enforcement Directive No. 2021-5 which is a revised “Body Worn Camera Policy” (a copy of which is included in your Retreat Binder) that conforms with the new legislation and reflects the practical experiences gained through law enforcement use of BWCs since they were introduced in 2015. While the Policy establishes foundational statewide standards, it permits agencies to account for local community needs and interests and encourages them to develop and share best practices as they gain experience in using these devices. The Directive became effective on June 1, 2021.

Body Worn Cameras (BWC) cont.

In addition to expanding the categories of officers required to be equipped with BWCs, the Policy continues a number of provisions from prior Directive 2015-1 that have proven to be best practices, such as the broad requirement that BWCs be activated in almost all police-citizen encounters and supervisory review of BWC recordings to improve officer performance. The Policy includes a number of new rules, including a requirement that officers, whenever safe and feasible, notify citizens when they are being recorded by a BWC; deactivate a BWC upon the request of a crime victim; and refrain from recording to gather intelligence information based on First Amendment protected speech, associations or religion.

Finally, the Policy prohibited law enforcement officers from reviewing BWC recordings prior to preparing initial police reports in most cases; incorporated longer retention periods for BWC recordings; provided additional opportunities for the subjects of BWC recordings to review the evidence; and provided for disciplinary action against those who violate the Policy.

On June 24, 2021, the Legislature adopted NJ A5864, which allows law enforcement officers to review BWC recordings prior to creating an initial report which overrides the AG Directive.

Retention of BWC Recordings:

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

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

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

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



Public Disclosure of BWC Recordings:

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

Authority of County Prosecutor to Impose Additional Requirements:

Nothing in the Policy shall be construed to in any way limit the authority of a County Prosecutor to issue directives or guidelines to the law enforcement agencies subject to his or her supervisory authority, setting forth additional procedural or substantive requirements or restrictions concerning BWCs and BWC recordings, provided that such directives or guidelines do not conflict with any explicit provision of the Policy.

For example, a County Prosecutor may specify additional circumstances when a municipal police department BWC must be activated; impose limits on the authority of a municipal police department to specify additional circumstances when a BWC must be activated; categorically prohibit the use of BWCs with enhanced audio/visual capabilities such as infrared night vision (cf. Section 7.6, which requires prosecutorial approval to use such features); and specify additional circumstances when a BWC recording will be "tagged," etc.

Violations:



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

Recent Government Records Court (GRC) Decisions:



Owoh (AADRI) v. City of New Brunswick, May 18, 2021

GRC Final Decision is included in your Retreat Binder

On April 16, 2020, the OPRA request sought DUI, DWI, Drug Possession and Drug Paraphernalia complaints and summons from January 2020 through the present. In addition, the request sought records, report and notifications showing and tracking the number of police officers who triggered the Early Warning System (EW System) performance indicators, the conduct that triggered the EW System and the remedial actions and disciplinary actions that were taken by the Police Department against Police Officers from 2019 to the present.

The issue arose when the Deputy Director of the PD responded in writing that the complaints and summonses that were requested were court records and not maintained by the New Brunswick PD.

As to the request for the EW System records, the Deputy Director asserted that the information was not maintained in a specific record or report and that compiling the information would require research and the creation of records not already maintained. The Complainant filed a Denial of Access Complaint with the GRC.

DECISION: Owoh (AADRI) v. City of New Brunswick, May 18, 2021

The GRC found that the Appellate Division's holding in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. October 2020) that notwithstanding the Millville Police Department's access to eCDR, "it does not alter the fact that the requested complaints and summonses are maintained by the Judiciary". Therefore, the burden of searching for responsive records should not be placed on local authorities when the records are maintained by others, and a search for records maintained by the Judiciary is not required.

As to the EW System records, the GRC determined that any underlying records produced under the AG Directive regarding the EW System, are integrally related to the internal personnel management of police officers. The Directive's confidentiality section should therefore be read through the lens of personnel records, which favors a presumption against disclosure.

Rodriguez v. Elizabeth Police Department, April 27, 2021

GRC Final Decision is included in your Retreat Binder

On February 10, 2020, the OPRA request sought:

- 1) Have any of the three (3) named detectives been part of any sort of investigation and if so, what was the results of those investigations?
- 2) Any and all video footage from the BWC on January 15, 2020.
- 3) What information was conveyed into the Elizabeth Police Department and/or the three (3) detectives?

In response to the request, the Custodian supplied an investigation report (with redactions for personal identifiers) and BWC footage on a compact disc. The issue raised by the Complainant was that the Custodian did not respond to Requests 1 and 3 and provided the BWC footage on a CD and not a flash drive. The GRC ruled that request items 1 and 3 asked questions, and did not seek identifiable “government records”, and therefore, the denial was appropriate. The GRC further found that supplying BWC footage on a CD was sufficient.



Owoh (AADRI) v. Montgomery Township, April 27, 2021

GRC Final Decision is included in your Retreat Binder

On December 26, 2019, the OPRA request sought:

- 1) DRE Rolling Log from January 2019 through present.
- 2) Summonses & Complaints relating to the DRE log.
- 3) DWI/DUI Complaints from January 2019 to present.
- 4) Drug Possession Complaints from January 2019 to present.
- 5) Drug Paraphernalia Complaints from January 2019 to present.
- 6) PD Arrest listings from January 2019 to present.



In response to the request, the Custodian responded in writing, providing responsive records with redactions. The Custodian assessed a specific service charge of \$773.20 representing 40 hours of staff time at \$19.33 per hour which was the rate of the PD's records clerk.

The issue raised by the Complainant was that the service charge was excessive and that he received no prior notice that a fee would be assessed.

DECISION: Owoh (AADRI) v. Montgomery Township, April 27, 2021

The GRC found that the Custodian failed to adhere to OPRA's requirement that a requester be given an opportunity to review and reject a special service charge prior to its imposition. (NJSA 47:1A-5(c). However, the GRC found that the conduct did not rise to the level of a knowing and willful violation.

The GRC also found that when a special services charge is at issue, the Custodian is required to complete a 14-point analysis questionnaire, but in this case, the GRC did not require the completion of the questionnaire.

The GRC found that 40 hours represents an extraordinary amount of time and effort to produce responsive records and manually redact them. Therefore, the special services charge of \$773.20 was warranted and reasonable.

Owoh (AADRI) v. Washington Township, August 24, 2021

GRC Final Decision is included in your Retreat Binder

On April 13, 2018, the OPRA request sought:

- 1) Summonses & Complaints relating to the DRE log.
- 2) DWI/DUI Complaints from January 2016 to present.
- 3) Drug Possession Complaints from January 2016 to present.

In response to the request, the Custodian responded in writing with the completed 14 point charge analysis, indicating that a specific service charge of \$4,467.84 for 1,985 records, representing 179 hours of staff time at \$24.96 per hour (which was the labor cost rate) would be assessed.

The issue raised by the Complainant was that the service charge was excessive.

The GRC referred the factors that were discussed in Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 1999 (October 28, 2002).

DECISION: Owoh (AADRI) v. Washington Township, August 24, 2021

The GRC found that the Custodian borne her burden of proof that a special service charge was warranted. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c).

The GRC also found that 37.25 hours to “review and redact” the records was reasonable given the number of potentially responsive records and the number of redactions needed for each.

However, the GRC found that 29.7 hours to “retrieve and print” and “scan and email” the records was unreasonable as the evidence of record foes not support the estimated time and effort to conduct those tasks.

The total recalculated special service charge awarded by the GRC was \$929.76 plus the actual costs of the disc.

The GRC also determined that the Complainant was the prevailing party since the assessed amount of the service charge was determined to be unreasonable. Therefore, the Complainant was entitled to recover attorney’s fee.

Owoh (AADRI) v. Borough of Avalon, August 24, 2021

GRC Final Decision is included in your Retreat Binder

On August 27, 2018, the OPRA request sought:

- 1) DWI/DUI Complaints from January 2017 to present.
- 2) Drug Possession Complaints from January 2017 to present.
- 3) Drug Paraphernalia Complaints from January 2017 to present.

In response to the request, the Custodian responded in writing stating that the requested records would need to be accessed from the Avalon Municipal Court.

On September 6, 2018 a Denial of Access Complaint was filed with the GRC.

DECISION: Owoh (AADRI) v. Borough of Avalon, August 24, 2021

The GRC found that the Custodian unlawfully denied access because they were obligated to conduct a search for responsive records through the Avalon Police Department's access to eCDR. Simmons v. Mercado, 247 N.J. 24, 29 (2021); however, the council did not order disclosure since the responsive records were provided to the Complainant on October 11, 2018.

The GRC also found that the Custodian's actions did not rise to the level of a knowing and willful violation.

The GRC also determined that the Complainant was the prevailing party since the Custodian provided the responsive records after the instant complaint was filed. Therefore, the Complainant was entitled to recover reasonable attorney's fees.

Owoh (AADRI) v. Borough of West Cape May, September 28, 2021

GRC Final Decision is included in your Retreat Binder

On August 27, 2018, the OPRA request sought:

- 1) DWI/DUI Complaints from January 2017 to present.
- 2) Drug Possession Complaints from January 2017 to present.
- 3) Arrest Listings from January 2017 to present.
- 4) Drug Paraphernalia Complaints from January 2017 to present.

In response to the request, the Custodian denied access to the requested records on the basis that the City of Cape May, with which the Borough of West Cape May had a shared services agreement, possessed the records.

On September 6, 2018 a Denial of Access Complaint was filed with the GRC.

DECISION: Owoh (AADRI) v. Borough of West Cape May, September 28, 2021

The GRC found that the Custodian unlawfully denied access because they had an obligation to obtain the responsive records from the City of Cape May and provide them to the Complainant.

The GRC deferred analysis of whether the Custodian's actions rose to the level of a knowing and willful violation.

The GRC also deferred analysis of whether the Complainant was the prevailing party pending the Custodian's compliance with the Council's Interim Order.

Owoh (AADRI) v. Town of Morristown, September 28, 2021

GRC Final Decision is included in your Retreat Binder

On January 16, 2020, the OPRA request sought:

- 1) Summonses & Complaints relating to the DRE log
- 2) DWI/DUI Complaints from January 2019 to present.
- 3) Drug Possession Complaints from January 2019 to present.
- 4) Drug Paraphernalia Complaints from January 2019 to present.

In response to the request, on January 29, 2020, the Custodian responded stating that the requested records would need to be accessed from the Morristown Municipal Court.

On February 24, 2020, a Denial of Access Complaint was filed with the GRC.

On March 2, 2020, the requested records were provided to the Complainant.

DECISION: Owoh (AADRI) v. Town of Morristown, September 28, 2021

The GRC found that the Custodian unlawfully denied access because they had an obligation to conduct a search for responsive records through the Morristown Police Department's access to eCDR. Simmons v. Mercado, 247 N.J. 24, 29 (2021); however, the council did not order disclosure since the responsive records were provided to the Complainant on March 3, 2020.

The GRC found that the conduct did not rise to the level of a knowing and willful violation.

The GRC also determined that the Complainant was the prevailing party since the Custodian provided the responsive records after the instant complaint was filed. Therefore, the Complainant was entitled to recover reasonable attorney's fees.

QUESTIONS / DISCUSSION

