

THE NEW OPEN PUBLIC RECORDS ACT FREQUENTLY ASKED QUESTIONS

The new law, commonly referred to as the Open Public Records Act, P.L. 2001, ch. 404, amends and supplements the public records laws of the State of New Jersey. The law goes into effect July 7, 2002. The major components of the new law are set forth in an accessible question and answer format. NJSBA has prepared these FAQ's, with some suggestions and guidance from the Department of Community Affairs (DCA), for board members and custodians of records to quickly familiarize themselves with the major components of the new law. This document is not to be construed as legal advice. NJSBA urges boards to discuss the specific implications of this new law with their attorneys.

1. What is the role of the board of education under the new records law?

The board of education must do two very important things: 1) It must have its records policy in place; and, 2) It must designate the custodian of records by formal action of the board. N.J.S.A. 47:1A-1.1.

2. May a board of education designate more than one custodian of records?

The law does not address this issue. DCA has suggested that an agency can have more than one records custodian. Boards may want to appoint a primary and a secondary records custodian. This might be appropriate in those instances when a records custodian is ill or on vacation. Boards are urged to consult their attorneys regarding this practice.

3. What is a government record?

A "government record" or "record" means any record in any form or medium, that has been made, maintained or kept on file in the course of his/hers or its official business by any State, local or regionally funded agency, including school boards. N.J.S.A. 47:1A-1.1.

4. What records are not included in this definition or are exempt from disclosure? (This list has been shortened to only contain those items of interest to boards of education)

- Items not considered public records: includes inter-agency or intra-agency advisory, consultative, or deliberative material (ACD). This would include documents made concerning a subject prior to official agency actions.

DCA offers the following examples of ACD exceptions, including: recommendations, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the adopted policy of the public agency. The ACD exception does not include purely factual material. If factual materials are contained in a document that also ACD materials, then, to the extent that the factual

materials can be separated from the deliberative materials, the factual materials should be supplied. N.J.S.A. 47:1A-1.1

- Trade secrets and proprietary commercial or financial information obtained from any source. Trade secrets shall include data processing software obtained by a public body under a licensing agreement that prohibits its disclosure. N.J.S.A. 47:1A-1.1.
- Any record within the attorney-client privilege. This does not include attorney- billing records where such bills or invoices have been redacted to remove any information protected by the attorney-client privilege. N.J.S.A. 47:1A-1.1
- Administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security. N.J.S.A. 47:1A-1.1.
- 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, including security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software. N.J.S.A. 47:1A-1.1.
- Information which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1.
- Information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position. N.J.S.A. 47:1A-1.1.
- Communications between a public agency and its insurance carrier, administrative service organization or risk management office. N.J.S.A. 47:1A-1.1.
- Information that is to be kept confidential pursuant to court order. N.J.S.A. 47:1A-1.1.
- That portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person; except for use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf thereof, or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor

Vehicles as permitted by law; and except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited. N.J.S.A. 47:1A-1.1.

- A victim's personal information shall not be released to the person(s) convicted of a crime against the victim, unless to aid in the defense of the requestor. N.J.S.A. 47:1A-2.2
- A citizen's personal information with which an agency has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. N.J.S.A. 47:1A-1.
- Other Personnel and Pension records information including but not limited to: records relating to any grievance filed by or against an individual, and any detailed medical or psychological information. N.J.S.A. 47:1A-10
- Any other exemption according to statute; resolution of either or both houses of the Legislature; regulations promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court or judicial case law; any federal law, regulation or order. N.J.S.A. 47:1A-1.1.

5. Are board of education self-evaluations exempt?

Maybe. In *Trenton Times Corp. v. Trenton Bd. of Ed.*, 138 N.J. Super. 357 (App Div. 1976), a newspaper sought a copy of a superintendent's evaluation. The court ruled in that case that the evaluation was not subject to disclosure, citing, in part, Executive Orders 9 and 11, governing the disclosure of personnel information. Whether or not such reasoning would apply to a board self-evaluation is unclear. A frank evaluation might be impossible if such a document was to be made public. The policy underlying the new OPRA law, however, is that the public has a right of access to government records, unless specifically exempt. Boards that perform self-evaluations should consult with their board attorneys for advice on this issue.

6. What fees may be charged by the board of education for a records request?

The fees that an agency can charge varies according to the type of record and the form of record requested. N.J.S.A. 47:1A-5.

- Statutory fee (Printed matter)
 - Pages 1 through 10 \$.75/page
 - Pages 11 through 20 \$.50/page
 - All pages after 20 \$.25/page

- If the actual cost, minus labor, exceeds statutory rate, then actual cost may be charged.
- For overly-burdensome printed material requests, special service fee may be charged on top of actual costs.
 - Examples: Where the nature, format, manner of collection or volume of records to be inspected or copied is such that:
 - The record cannot be reproduced using ordinary equipment, in ordinary business size (e.g. a map or plat)
 - Complying with the request involves an extraordinary expenditure of time and effort.
- Non-printed materials only
 1. For a record embodied in a form other than printed matter, an agency may only charge the “actual” cost of duplicating the record. This cost includes only the cost of materials and supplies used to make the copy. An agency cannot charge for labor or the other overhead expenses of making the copy.
 2. EXCEPTION--A special reasonable charge based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. Only to be used for those records that are:
 - In a medium not routinely used by the agency;
 - Not routinely developed or maintained by an agency; or,
 - Requiring a substantial amount of manipulation or programming of information technology.

Before undertaking an action that would result in the imposition of a special charge, the custodian must first inform the requester that a special charge will be incurred and give the requester the opportunity to accept or reject the special charge. If the requester objects to the special charge and refuses to pay it, the custodian may deny the request for access to the record. However, if the requester is willing to pay for it, the agency has the responsibility to provide access to the government record in the unsupported format.

7. May a deposit for copies of a record be required?

The law only permits a deposit for the costs of duplicating a record in one circumstance—when the requestor wishes to remain anonymous. In that case, if the custodian anticipates that the information thus requested will cost in excess of \$5 to reproduce, a deposit may be charged. Boards are urged to contact their attorneys regarding requiring deposits in other circumstances. N.J.S.A. 47:1A-5f.

8. How much time does a custodian of records have to fulfill or deny a records request?

A custodian of records must meet a variety of deadlines depending on the types of records requested. Failure to fulfill a records request within the statutory timelines shall be deemed a denial of the request:

- **Immediate access** “ordinarily shall be granted” to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information. N.J.S.A. 47:1A-5e.
- For all other requests, the custodian of records has **seven business days** to either: 1) Grant access to the available record, or; 2) Give a date to the requestor by which the record will be produced, if it is currently unavailable because it is archived or in storage. N.J.S.A. 47:1A-5i.
- These **timelines do not apply** if the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor. If a means of contacting the requestor has not been provided, then the custodian need not respond until the requestor reappears seeking a response to the request. N.J.S.A. 47:1A-5i.

9. If a record has been denied by the custodian of records, does the requestor have a right to appeal?

Yes. A person who is denied access to a government record by the custodian of records, may either:

- Institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or
- File a complaint with the Government Records Council.

These rights of appeal for a records requestor must be posted in a prominent place in the parts of the offices of the records custodian frequented by the public.

The right to institute any proceeding is solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. N.J.S.A. 47:1A-6.

10. What happens if the custodian has improperly denied access to a public record?

- If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. N.J.S.A. 47:1A-6.
- The requestor, if successful, will be entitled to have reasonable attorney fees paid by the district. N.J.S.A. 47:1A-6.
- A public official, officer, employee or custodian who knowingly and willfully violates this new public records law, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed. N.J.S.A. 47:1A-11.

11. What is the Government Records Council (GRC)?

The GRC is a specialized five-member public body that resides in the Department of Community Affairs. The Commissioners of the Departments of Community Affairs and Education, or their representatives, sit on the council. The GRC is also made up of three members of the public. N.J.S.A. 47:1A-7.

The GRC is empowered to hear, mediate and adjudicate records disputes. It also has the power to issue advisory opinions on whether a particular type of government record is accessible to the public. The GRC is also responsible for preparing guidelines and pamphlets for use by custodians of records and requestors of records. The GRC must also provide training opportunities for records custodians and public officers. To provide as much assistance as possible to custodians and requestors alike, the GRC will be operating an informational website and a toll-free number that will be staffed during regular business hours. N.J.S.A. 47:1A-7b.

12. What resources are available to assist records custodians?

See the resources and links listed on the NJSBA Legal Department website. Go to www.njsba.org and click on “legal” to find the “New Public Records Law Information” subsection.