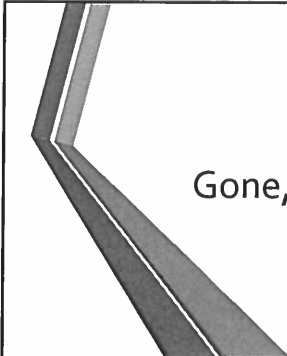


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## Gone, But Not Forgotten

Employee Separation and the  
Board's Post-Employment Obligations

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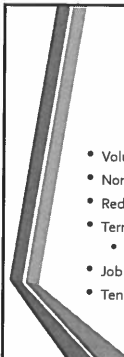
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## How do employees separate?

- Voluntary resignation and/or resignation in lieu of termination
- Nonrenewal
- Reduction in Force (RIF)
- Termination for Cause
  - Mid-year termination
- Job abandonment
- Tenure Charges

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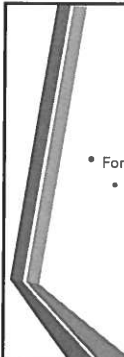
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## Strategies at the time of separation

- For nonrenewals
  - Offer opportunity to voluntarily resign
    - Provides an employee the opportunity to set the narrative for separation in post-employment job search
    - Potential for positive reference
    - Litigation Pitfall – references used in post-employment lawsuit as evidence of pretext

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**Strategies at the time of separation**

- Separation Agreements
  - Rare in public school likely because of unfettered right to nonrenew
  - Common in private industry
- Features
  - Payment or other consideration (i.e., extended health benefits or positive references)
  - General release of all employment law claims
  - Specify as to post-employment obligations (but note N.J.S.A. 15A:6-7.3 obligations)
- Benefits – Assurance that there will be no lawsuit
- Costs
  - The actual money
  - Optics - Requires approval by the Board at a public meeting
  - Do they lawyer up?

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**Strategies at the time of separation**

- Separation Agreements
  - Other features
    - No rehire clause *Rivera v. Town of W. New York*, A-2049-10T4, 2012 WL 489054, at \*2 (N.J. Super. Ct. App. Div. Feb. 16, 2012)
    - Not to return to school grounds or attend school functions
    - Neutral reference
    - Non-disparagement

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**Hypothetical 1**

- Superintendent/Principal timely notifies nontenured teacher that he/she will not be recommended for renewal
  - Teacher has borderline numerical scores on evaluations
  - Principal has met with employee numerous times throughout the year regarding teaching performance
  - Teacher requests a follow-up meeting with the Principal
    - Do you schedule the meeting?

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**Hypothetical 1**

- At the meeting, employee delivers written letter of "issues"; never previously made any complaints
  - Never checked lesson plans; No guidance(mentoring)assistance
    - "I am the only black teaching member"; stated to me you better pray to God, Allah, or whoever.
  - I asked for additional services for a student with special needs that were not addressed.
- Do you investigate?

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**Hypothetical 1**

- Avoid the meeting
  - The decision to non-renew is a difficult one. You have already made that decision.
  - Instead, memorialize prior date of meeting and that notice of nonrenewal provided
  - Refer them to their association for advice and guidance
    - Likely leads them to statement of reasons and potential Donaldson Hearing

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**Hypothetical 1**

- Investigate the Complaint?
  - Reasons to investigate
    - If the facts are true, it is a policy, statutory, or regulatory violation
    - The failure to investigate may have consequences

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**Employment Law Causes of Action**

- Common Statutory Employment Law Claims related to the separation
  - Law Against Discrimination
  - Conscientious Employee Protection Act
- Common Law related to the post-employment references
  - Defamation
  - Tortious Interference

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**Statutory Causes**

- Considerations at the time of separation that indicate a potential lawsuit
  - Protected class member
  - Disability/Workers Compensation
  - Requests for Leave
  - Whistle-blowing activity
  - Temporal Proximity

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**Common Law Post-employment Causes of Action**

- Defamation
  - Employer made a defamatory statement that concerned Plaintiff that was false and communicated to someone other than plaintiff.
  - Limit references to what is required by OPRA and other laws
- Tortious Interference with prospective business/contractual relation
  - Protects the right "to pursue one's business, calling or occupation free from undue influence or molestation *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 750 (1989)
  - Malicious interference – requires more than inaccurate information

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### Hypothetical 2

- Two students reports that their music teacher makes sexually charged comments during class. The same students report that the music teacher finds a reason to speak with them individually and questions them about romantic interests and sexual activity.
  - Does the school need to make a report to IAIU?

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### Hypothetical 2

- IAIU Investigation
  - Not established: There is sufficient evidence to believe that the comments were made, but there is no finding of sexual abuse within the meaning of the law.
  - Sexual abuse requires finding of emotional harm.

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### Hypothetical 2

- District files tenure charges
  - Does finding of "not established" does not preclude tenure charges.
  - Use of IAIU investigation results permitted as evidence?
  - Case law demonstrates district must have evidence to show conduct becoming
    - Conduct investigation
    - Student statements
    - Witness statements
    - Documentary evidence

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### Hypothetical 2

- The tenure charges advance to hearing, and the employee elects to resign in lieu of proceeding
- Assume the parties enter into a settlement agreement
  - Agreement MUST not suppress or destroy information about the investigation of suspected child abuse or sexual misconduct
    - Applies to current and former employees
  - MUST NOT affect the employer's right to report suspected child abuse or sexual misconduct
    - Cannot agree to a resignation in lieu of report
  - Ability to expunge
    - Permitted ONLY if the allegations were either 1) false or 2) not substantiated
    - Otherwise, the documents and information about the report may not be expunged.

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### Hypothetical 2

- Future references
  - Former employers MUST confirm
    - Dates of employment
    - Statement about whether
      - Employee was the subject of an investigation
      - Employee was disciplined, discharged, non-renewed, asked to resign, resigned, or otherwise separated from employment because
        - An investigation was an ongoing OIG
        - An adjudication/finding was rendered
      - Employee's license/certificate was suspended, revoked or surrendered during
        - An on-going investigation or
        - Adjudication/finding was rendered

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### Hypothetical 2

- Inclusion of waiver of claims?
  - Valid consideration
    - Public approval of payment in exchange for the release
    - Risk of possible litigation (and costs)
  - Limits on waiver of claims
    - ADEA
    - Administrative action- right of participation versus the right of recovery

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### Hypothetical 2

- Resignation without settlement agreement
  - Employer obligations under Pass the Trash are not changed.
  - If the employer does not provide this information, the applicant may be disqualified from consideration
  - Review policy before continuing to make neutral references
  - Balance risk of litigation against separation without an agreement

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### Hypothetical 3

- A student reports that she has engaged in sexual activity with her non-tenured math teacher.
- Who should the school contact?
  - Contact law enforcement authorities
  - IAIU
- Determine whether the teacher should remain in the classroom or if he should be suspended with pay pending the result of the investigation.

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### Hypothetical 3

- During Investigations, the student admitted that she made a false report.
  - The student informs IAIU that she made the report because the math teacher refused to give her a passing grade.
- IAIU determination is unfounded because of the student's admission.
- As a result of the finding, the teacher is returned to the classroom.
- The teacher is offered a contract for the following school year.
- The District subsequently receives a request for references from another district.

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### Hypothetical 3

- What must the board disclose?
  - Dates of employment
  - Statement about whether
    - Employee was the subject of an investigation
    - Employee was disciplined, discharged, non-renewed, asked to resign, resigned, or otherwise separated from employment because
      - An investigation was on-going OR
      - An adjudication/finding was rendered
  - Employee's license/certificate was suspended, revoked or surrendered during
    - An on going investigation OR
    - Adjudication/finding was rendered

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### Hypothetical 3

- The Board responds to the inquiry during the required timeframe
- The Board clearly states that the investigation was deemed unfounded because the student admitted to lying about the allegations
- The math teacher does not get the job for which he applied.

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### Hypothetical 3

- The references were given by the Business Administrator, in accordance with the district's policy. What, if any, liability does he face because the applicant was not given the position?
  - Even assuming that the references were the basis for his disqualification:
    - Employers and school administrators are afforded immunity
      - Civil and criminal immunity attaches
      - EXCEPT if the report was knowingly false.
    - Policy review about individual(s) authorized to give references

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### Hypothetical 3

- What, if any, liability does the prospective employer have for failing to hire based on the references received?
  - No liability:
    - If the information was received OR
    - If the disqualification was the result of the failure to obtain the information to conduct the background check.
- The same is true if the employee is ultimately terminated because
  - Of the information received OR
  - If the disqualification was the result of the failure to obtain the information

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### Pass the Trash Law - Recap

- Law effective on June 1, 2018
- Applicants MUST provide
  - Contact information for current employer AND former employers that were schools or positions involving direct contact with children
  - 20 year look back.
  - Affirmative consent, with a release of liability, to disclose information to a prospective employer
- A written statement about whether
  - He was the subject of an investigation for child abuse or sexual misconduct;
  - He was disciplined, discharged, non-renewed, separated (including resignation or requested resignation) because of an investigation or finding of child abuse or sexual misconduct; OR
  - He had his license suspended, revoked, or surrendered during investigation or because of adjudication/finding of child abuse or sexual misconduct
- Not subject to OPRA

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### Pass the Trash Law- Recap

- Failure to comply may include
  - Criminal prosecution
  - Civil penalty
  - Termination or discipline
- A statement warning an applicant of the possible ramifications must be included on all applications involving direct student contact.
- Applies to contracted service providers.

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### Pass the Trash Law- Best Practices

- Update References Policy
  - Determine which administrator has authority to give references
  - Provide training to all administrators and HR staff
  - Impact on unofficial letter of references
- Update background check policies
  - Remember that FCRA may also attach
- Update applications

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### Pass the Trash Law- Best Practices

- To settle or not to settle?
  - Must be evaluated on a case by case basis.
  - Guaranteed resignation may be best for school district, HOWEVER
    - Affirmative obligations attach to settlement agreements
    - Unclear that neutral references (dates, salary, and title) may be provided
    - Neutral reference promise was often part of an incentive to settle
  - Are agreements to not respond to background checks permissive?
  - Consider continued use of provision waiving a right of reinstatement/application
    - Redundant or protective?
  - Settlement, admissions and pension implications

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### Pass the Trash Law and OPRA

- Information acquired under the law is not subject to OPRA
- HOWEVER, a reason for separation may be a "public record" for purposes of the OPRA.
  - The first exception simply and unequivocally provides that an "individual's name, title, position, salary, ... date of separation and the reason therefor ... shall be a government record." N.J.S.A. 4:71A-10 (emphasis added).
    - The information itself is therefore a government record that must be provided in accordance with OPRA's disclosure requirements independent of whether the information is reflected in a document. *Libertarians for Transparent Gov't v. Ocean Cty. Prosecutor's Office*, A-1608-1674, 2018 WL 286747, at \*4 (N.J. Super. Ct. App. Div. Jan. 5, 2018)
    - It does not require the provision of the circumstances that may have caused an employer to choose to resign, the employer's motivation for resigning, or anything beyond the reason for the employee's "date of separation." *Libertarians for Transparent Gov't v. Ocean Cty. Prosecutor's Office*, A-1608-1674, 2018 WL 286747, at \*5 (N.J. Super. Ct. App. Div. Jan. 5, 2018)

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### OPRA Requests for Personnel Information

- An "individual's name, title, position, salary, ... date of separation and the reason therefor ... shall be a government record." N.J.S.A. 47:1A-10.
- 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-10.

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### OPRA requests for personnel information

- The New Jersey Supreme Court determined that audio tapes of two public agency executive session meetings "constitute[d] public records subject to the common-law right to inspection [...] Confidential or privileged information must still be excised." Atlantic City Convention Center Authority v. South Jersey Publishing Company, Inc., 135 N.J. 53, 66 (1994).
- Public entity not required to disclose minutes of proceedings protected by attorney-client privilege exception to Open Public Records Act. Paff v. Perth Amboy City Council, A-4806-04T3, 2005 WL 4014435 (N.J. Super. Ct. App. Div. May 17, 2006)

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### OPRA - Reasons for Separation

- Libertarians for Transparent Gov't v. Ocean Cty. Prosecutor's Office, A-1608-16T1, 2018 WL 286747, at \*4 (N.J. Super. Ct. App. Div. Jan. 5, 2018).
- Plaintiff, suspecting that a former employee of the Ocean County Prosecutor's Office resigned over a failed drug test, filed an OPRA request for the "reason for separation".
- The information itself is therefore a government record that must be provided in accordance with OPRA's disclosure requirements independent of whether the information is reflected in a document Libertarians for Transparent Gov't v. Ocean Cty. Prosecutor's Office, A-1608-16T1, 2018 WL 286747, at \*4 (N.J. Super. Ct. App. Div. Jan. 5, 2018).

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### OPRA - Reasons for Separation

- The Court has observed that "OPRA does not require public agencies to create records," *Sussex Commons Assocs. LLC v. Rutgers Univ.*, 210 N.J. 531, 544 (2012), and "is 'not intended [to be] a research tool [that] litigants may use to force government officials to identify and siphon useful information,'" *In re N.J. Firemen's Ass'n Obligation*, 230 N.J. 258, 276 (2017) (quoting *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005)).

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### OPRA - Reasons for Separation

- The OCPO produced what it represented was the sole personnel record showing that Doe separated from employment on a particular date because he resigned. We find no basis in the plain language of N.J.S.A. 47:1A-10 to conclude that in addition to providing the reason for Doe's date of separation, the OCPO was required to investigate, determine and disclose Doe's motivation for resigning or the circumstances surrounding his decision to resign.
- The first exception requires only the production of the specified information and existing "document[s] otherwise classified as personnel records fit[ting]" within the exception. We are therefore convinced the OCPO provided plaintiff with what it was entitled under N.J.S.A. 47:1A-10: a government record, in the form of the First Assistant Prosecutor's memorandum, stating the effective date of Doe's resignation.

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### OPRA - Reasons for Separation

- *Libertarians for Transparent Government v. Shore Regional High School Dist.*, 2017 WL 2210239 (N.J. Super. L.), 4 – Trial Court Decision
- Requestor sought reasons for separation of former business administrator accused of improprieties. Request was denied because defendant claimed plaintiff failed to "identify specific government records."
- Court held, "There is no question that defendant violated the provisions of OPRA by failing to provide information regarding [business administrator's] date of separation and the "reason therefor." The court is not persuaded by defendant's argument that the request constituted a request for "information" as opposed to "government records." A plain reading of the statute reveals that "information," in the form of "an individual's name, title, position, salary payroll record, length of service, date of separation and the reason therefor" is specifically discoverable pursuant to N.J.S.A. 47:1A-10."

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OPRA - Reasons for Separation

- The Custodian could not limit his search to the review of the personnel file.
- If a reason is identified in a record, it must be provided.

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