

## Public Employees Cannot Escape OPRA by Using Personal Email Accounts

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News broke this week that Hillary Rodham Clinton exclusively used her personal email account to conduct government business while she was Secretary of State. Unfortunately, this practice occurs quite frequently at the local levels of government and it has the potential to undermine government transparency, as it allows public officials to conduct public business behind closed doors. New Jersey's Open Public Records Act ("OPRA") is broad enough, however, to require such emails to be produced.

OPRA defines a "government record" as any document (including electronically stored information, such as email) "that has been made, maintained or kept on file" in the course of a public official or public employee's "official business." This means that the right to access an email via OPRA is based on the content and nature of an email itself, not the specific account from which the email was sent. In other words, if a public employee sends an email in which public business is discussed then that email is subject to OPRA regardless of whether it was sent from the public employee's official business account or from a personal account such as Gmail or Yahoo.

There are complications, of course, which is why public agencies should adopt policies that require all public business to be conducted via the agency's official business accounts. When an OPRA request is submitted for emails, a Records Custodian can easily ask the IT Department to search the public agency's server to find responsive emails—even those that have been deleted from the employee's inbox. It is much more difficult, however, to gain access to personal email accounts and the Records Custodian generally must rely upon the employee to search his or her own personal email account and produce all responsive emails. At worst, this opens the door for potential corruption because the Records Custodian has no control over what was produced. At best, it is probable that not all responsive

emails will be produced simply because the public employee likely deleted emails from the personal account over time and they are generally recoverable on a private server like they are on the public agency's official email server.

When making an OPRA request, ask for emails from both the official government account and any personal email account so that the Records Custodian knows that **both** must be searched. When you receive a response, clarify with the Records Custodian that any personal accounts were also searched.

