

## Transparency Becomes COVID-19 Victim - NJ OPRA Blog

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As we previously wrote on this blog, the Legislature amended OPRA in mid-March 2020 in response to the COVID-19 pandemic. Now and in the future, during a public health emergency, state of emergency, or state of local disaster emergency, a public agency no longer needs to respond to an OPRA request within seven business days. Instead, an agency must only make “a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.” N.J.S.A. 47:1A-5(i)(2).

### Journalists Expose Transparency Issues

The COVID-19 pandemic has become a roadblock for the news media and those who seek information from the government. Reporters from NorthJersey.com, the Star Ledger, and the Associated Press collaborated and published three news stories today reporting about the serious lack of transparency in New Jersey during COVID-19. The articles discuss not only the State’s over-use of a confidentiality provision in the Emergency Health Powers Act to keep reporters from gaining important information about the State’s response to COVID-19, but also the fact that some counties and municipalities have essentially shut down their OPRA responses altogether. Other agencies are taking lengthy extensions, making it hard for reporters to report about local news. As NorthJersey.com wrote in its article:

*Response to New Jersey’s amended law has been mixed, and some places continue to provide records in seven days. Others, like Jersey City, tell people not to expect a response at all.*

*“Due to the active state of emergency in relation to COVID-19, the City of Jersey City will not be able to respond to OPRA requests within seven (7) business days,” the city’s website says. “The City*

*appreciates your patience during this difficult time.”*

*Dozens of government bodies from Hawthorne to Wildwood Crest have sought extensions and referenced or cited the pandemic as a reason, according to data provided by OPRAmachine, a website that helps residents submit record requests and tracks and analyzes the responses from public officials.*

*Delays range from a few days to weeks, and often cite closed municipal buildings and lack of staff. The website provides just a snapshot of the response, because most records requests across the state aren't publicly tracked.*

*“This is very troublesome and a crisis unto itself,” said Pashman Stein Walder Hayden partner CJ Griffin. “We know from experience that secrecy inevitably leads to corruption, misconduct, waste and abuse. OPRA was enacted to permit the public to keep a watchful eye on government, but right now it can't perform that function in many municipalities across this state.”*

Today's reporting follows an earlier article by New Brunswick Today, which also expressed concern about the State's rush to amend OPRA and pointed out that public agencies have a long tradition of violating OPRA's statutory deadlines in the past:

*Advocates for transparency found the altered OPRA law confusing, given that records clerks often respond to requests within the seven business days only to make a request of their own: for an extension for more time to put together a substantive response.*

*Many government agencies have been known to play games with those who request records, asking for extension after extension, only to come back with a final decision that the request was improper or that the records cannot be released. Still others can't seem to meet their own self-imposed timelines, and need to be reminded repeatedly about outstanding requests.*

### **Guidance from the GRC**

Recently, the Government Records Council took the extraordinary step of issuing a “Special Statement” on the amendment to OPRA, providing guidance on how it will determine whether an agency's response is reasonable when receives denial of access complaints:

*Please note that any dispute over extensions will be reviewed on a case-by-case basis because OPRA does not include a limitation on requesting extensions. However, the GRC's analysis of this issue has included recognition of “extenuating circumstances.” Those circumstances would include, but not be limited to, retrieval of records that are in storage or archived (especially if at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the public agency, or the public agency's need to reallocate resources to a higher priority due to force majeure.*

*In closing, the GRC stresses that custodians within agencies operating under normal business hours during an emergency, even if closed to the public or working off-site, are obligated to respond to OPRA requests upon receipt in due course to the extent possible. Additionally, custodians should proactively advise the public (by website notification and/or other methods) if the method of transmission for OPRA requests has changed or been limited due to a state of emergency. Similarly, members of the public wishing to submit OPRA requests should contact the applicable public agency for updates on any limitations or disruptions affecting the OPRA process during a state of emergency.*

Courts are, of course, free to disregard the GRC's guidance and they have done so before. Nonetheless, the GRC's Special Statement makes it clear that agencies that are open for business, even if working remotely, cannot simply ignore OPRA requests and must act reasonably to try to respond to them. It may be reasonable to request an extension for records that exist only in paper copy or that are locked away in storage somewhere, but some agencies are taking lengthy extensions even for electronic records that are easily retrievable.