

## Using New Jersey's Open Public Records Act as a Litigation Tool

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Those who frequently litigate are aware that the discovery process often involves numerous components, including interrogatories, document demands, subpoenas, depositions, and requests for admissions. In addition to these traditional tools, New Jersey offers an additional discovery mechanism that is often overlooked: the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq. When a dispute involves a public agency, public property, or public resources, OPRA can be an important information gathering tool, both where a lawsuit has already been filed and when a party is simply gathering facts necessary to draft the complaint and initiate the litigation. Thus, OPRA may be a useful litigation tool for construction companies, real estate development companies, financial lenders, insurance companies, and any other entities that deal with public agencies, public property, or public resources.

Our courts have found that it is perfectly acceptable to use OPRA in lieu of written discovery requests or subpoenas and there are several benefits to doing so. First, the recipient of an OPRA request must respond much more swiftly to that request than to a subpoena or discovery demand. The public agency must respond within a mere seven business days, whereas the thirty-to-sixty day deadline for responding to traditional written discovery is often missed by litigants and discovery is often not produced until a motion to compel is filed.

Second, the New Jersey judiciary's discovery rules require that a party demonstrate that the documents or information requested in written discovery are relevant to admissible evidence, but a request for records under OPRA requires no such showing. Government records must be produced within seven business days of an OPRA request, unless the record can be categorized under one of OPRA's 24 narrow

exemptions (such as personnel records, criminal investigatory records, certain security-related information, etc).

Finally, OPRA contains a mandatory fee-shifting provision if a court finds that a public agency unlawfully denied access to a record. Thus, while companies might pay outside counsel's hourly rates to assist in drafting the OPRA requests and litigating to obtain access to records, those companies will be reimbursed a "reasonable" attorney fee if the court finds that the public agency violated OPRA. In contrast, if an adversary fails to properly respond to a discovery request and the court grants a motion to compel, the decision to award attorneys' fees is discretionary and rarely occurs in practice.

When using OPRA as a litigation tool, it is important to work with an outside counsel who is well-versed in crafting OPRA requests because a valid OPRA request is markedly different from a typical discovery request. Discovery requests are often broad and require the adversary to analyze information, make computations, and answer specific questions. A valid OPRA request is the opposite—it is not simply a general request for information or a broad category of records. A requestor generally cannot seek an entire project file, but instead must identify the specific records within the file that it wants to receive. A valid OPRA request does not require the records custodian to perform any research or analysis, nor ask the custodian to calculate data or answer questions. To be upheld, an OPRA request must seek easily identifiable records by name, such as contracts, budgets, bills, meeting minutes, logbooks, emails, RFQs, vouchers, check registries, or correspondence.

In-house counsel who draft OPRA requests should keep these tips in mind:

1. Make sure that your request seeks a specific government record and not information. Invalid Request: "Please state Employee X's annual salary." Valid Request: "Please provide copies of Employee X's most recent payroll record."
2. Keep your request narrow in date and scope. Invalid Request: "Please provide any and all documents relating to Town X's contract with Company Y." Valid Request: "Please produce the following records relating to Town X's contract with Company Y for the construction of the new school: the RFP, quote or bid submitted by Company Y, Town X's resolution awarding Company Y the contract, and all bills/invoices submitted from Company Y from January 1, 2014 to present date."
3. For copies of email correspondence, you should identify the date range, subject matter, and sender and/or receiver in requests. Invalid: "Please provide all emails to or from the Mayor for Year 2014." Valid: "Please provide every email to or from the Mayor received or sent in January 2014 regarding the township's budget."
4. Remember to indicate the method by which you wish to receive the records. Do you wish to receive PDF copies of records via email? Do you want hard copies, for which you will incur a copying charge of 5 cents per a page? Or, do you want the document in an electronic format such as a spreadsheet? A public agency may charge for converting certain records into another medium, but it may only charge for the "actual costs" it incurs.

Using these general guidelines will help ensure that the records custodian does not deny the request as invalid.

As mentioned above, if a request is valid, then the public agency has seven business days to respond and that response must be in writing. The response should either enclose the requested records, indicate why access to specific records is being denied, or request an extension of time to comply with the request if the request was voluminous. If the records contained confidential information (such as social security numbers, attorney-client privileged information, etc.), the public agency may redact the protected information but must grant access to the rest of the record. The public agency also must indicate why the redactions were made and redact as narrowly as possible.

To challenge a public agency's response to an OPRA request, the requesting company should file a Verified Complaint and Order to Show Cause (OTSC) in the Superior Court. While OPRA also allows requestors to file a challenge before the Government Records Council (GRC), the Superior Court is a much faster route for resolution of such disputes. Generally, the OTSC return date is set four to six weeks after the initial filing of the Verified Complaint. Thus, a company using OPRA to obtain discovery could theoretically file a request, receive a denial, file litigation, and obtain a court order compelling production of the requested government records before a response to traditional written discovery would have even been due. Given this efficiency, companies should be aware of the benefits of OPRA and consult experienced practitioners to make the best use of this underutilized litigation tool.