

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

NEW JERSEY

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE

OPEN RECORDS AND MEETINGS LAWS IN

NEW JERSEY

Prepared by:
Thomas J. Cafferty, Esq.
Nomi I. Lowy Esq.
Lauren James-Weir, Esq.
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4863



Sixth Edition
2011

OPEN GOVERNMENT GUIDE

Access to Public Records and Meetings in

NEW JERSEY

SIXTH EDITION
2011

Previously Titled
Tapping Officials' Secrets

Published by The Reporters Committee for Freedom of the Press
Lucy A. Dalglish, Executive Director

EDITORS

Gregg Leslie, Legal Defense Director
Mark Caramanica, Freedom of Information Director

ASSISTANT EDITORS

Christine Beckett, Jack Nelson Legal Fellow
Aaron Mackey
Emily Peterson

Production of the sixth edition of this compendium was possible
due to the generous financial contributions of:
The Stanton Foundation

© 2011, 2006, 2001, 1997, 1993, 1989 by The Reporters Committee for Freedom of the Press.
All rights reserved. No part of this publication may be reproduced in any form or
by any means without the prior, written permission of the publisher.

ISBN: 1-58078-232-9

Contents

Introductory Note	iv	V. PROCEDURE FOR OBTAINING RECORDS	16
User’s Guide	v	A. How to start.....	16
FOREWORD	1	B. How long to wait.....	17
Open Records.....	2	C. Administrative appeal.....	17
I. STATUTE -- BASIC APPLICATION.....	2	D. Court action.....	17
A. Who can request records?	2	E. Appealing initial court decisions.....	18
B. Whose records are and are not subject to the act?	2	F. Addressing government suits against disclosure.....	18
C. What records are and are not subject to the act?	2	Open Meetings.....	19
D. Fee provisions or practices.....	3	I. STATUTE -- BASIC APPLICATION.....	19
E. Who enforces the act?	3	A. Who may attend?	19
F. Are there sanctions for noncompliance?	3	B. What governments are subject to the law?	19
II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS	3	C. What bodies are covered by the law?	19
A. Exemptions in the open records statute.....	3	D. What constitutes a meeting subject to the law.....	19
B. Other statutory exclusions.....	7	E. Categories of meetings subject to the law.....	20
C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.....	7	F. Recording/broadcast of meetings.....	22
D. Are segregable portions of records containing exempt material available?.....	7	G. Are there sanctions for noncompliance?	22
E. Homeland Security Measures.....	7	II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS	22
III. STATE LAW ON ELECTRONIC RECORDS.....	7	A. Exemptions in the open meetings statute.....	22
A. Can the requester choose a format for receiving records?	7	B. Any other statutory requirements for closed or open meetings. 23	23
B. Can the requester obtain a customized search of computer databases to fit particular needs?	7	C. Court mandated opening, closing.....	23
C. Does the existence of information in electronic format affect its openness?	7	III. MEETING CATEGORIES -- OPEN OR CLOSED.....	23
D. How is e-mail treated?	8	A. Adjudications by administrative bodies.....	23
E. How are text messages and instant messages treated?	8	B. Budget sessions.....	23
F. How are social media postings and messages treated?	8	C. Business and industry relations.....	23
G. How are online discussion board posts treated?	8	D. Federal programs.....	23
H. Computer software.....	8	E. Financial data of public bodies.....	23
I. How are fees for electronic records assessed?	9	F. Financial data, trade secrets or proprietary data of private corporations and individuals.....	23
J. Money-making schemes.....	9	G. Gifts, trusts and honorary degrees.....	23
K. On-line dissemination.....	9	H. Grand jury testimony by public employees.....	23
IV. RECORD CATEGORIES -- OPEN OR CLOSED.....	9	I. Licensing examinations.....	23
A. Autopsy reports.....	9	J. Litigation; pending litigation or other attorney-client privileges.....	23
B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)	9	K. Negotiations and collective bargaining of public employees.....	24
C. Bank records.....	9	L. Parole board meetings, or meetings involving parole board decisions.....	24
D. Budgets.....	10	M. Patients; discussions on individual patients.....	24
E. Business records, financial data, trade secrets.....	10	N. Personnel matters.....	24
F. Contracts, proposals and bids.....	10	O. Real estate negotiations.....	24
G. Collective bargaining records.....	10	P. Security, national and/or state, of buildings, personnel or other.....	24
H. Coroners reports.....	10	Q. Students; discussions on individual students.....	24
I. Economic development records.....	10	IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS	24
J. Election records.....	10	A. When to challenge.....	24
K. Gun permits.....	11	B. How to start.....	24
L. Hospital reports.....	11	C. Court review of administrative decision.....	24
M. Personnel records.....	11	D. Appealing initial court decisions.....	25
N. Police records.....	11	V. ASSERTING A RIGHT TO COMMENT.....	25
O. Prison, parole and probation reports.....	13	A. Is there a right to participate in public meetings?	25
P. Public utility records.....	14	B. Must a commenter give notice of intentions to comment?	25
Q. Real estate appraisals, negotiations.....	14	C. Can a public body limit comment?	25
R. School and university records.....	14	D. How can a participant assert rights to comment?	25
S. Vital statistics.....	15	E. Are there sanctions for unapproved comment?	25
		Statute.....	26

Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

Prepared by:

Thomas J. Cafferty, Esq.
 Nomi I. Lowy Esq.
 Lauren James-Weir, Esq.
 Gibbons P.C.
 One Gateway Center
 Newark, New Jersey 07102
 (973) 596-4863

FOREWORD

Open Records. On January 8, 2002, Acting Governor, Donald DiFrancesco, signed into Law a new Open Public Records Act (“OPRA”).

The new statute makes significant improvements to the prior Right to Know Law:

- The law provides a succinct definition of “public record” which will assist custodians in providing access while at the same time excluding from the definition records not kept by a public officer in the course of his/her official business.
- The law provides a uniform system for requesting records and responding to requests as well as a time from within which the custodian must respond to the request — a significant omission in the prior Right to Know Law.
- The law preserves the existing court review of access disputes and provides a less expensive alternative administrative review, at the requester’s option through the Government Records Council.
- The law provides for penalties for a knowing and willful violation of the law and allows for the recovery of reasonable attorney fees by a requester who prevails in a proceeding to gain access.
- The law preserves the common law right of access.
- The law provides for access to records stored or maintained electronically.
- The law preserves the confidentiality of investigative records by maintaining the current law as it applies to such records. In recognition of the need to protect investigations in progress and the law enforcement offices involved in those investigations, the Act does not broaden the existing right to access to such records but does broaden the right of access to non-investigatory records maintained by law enforcement agencies.

Open Meetings.

In 1975 the New Jersey Legislature enacted the Open Public Meeting Act, N.J.S.A. 10:4-6, *et seq.*, commonly known as the “Sunshine Law.” While some of the provisions of this Act had been included in prior legislation (See N.J.S.A. 10:4-1 to 5, repealed by L.1975, c.231), the Legislature saw the need for a stronger statute in order to prevent the public and the press from being “needlessly barr[ed] . . . from certain policymaking meetings of public bodies.” *Introductory State-*

ment of Assembly No. 1030 — L.1975, c.231. The Sunshine Law was intended by the Legislature to establish comprehensive and uniform procedures at all levels of government to insure

that the public and the press have advance notice of and the opportunity to attend most meetings, including executive sessions, of all public bodies

Evidence of the strong public policies which underlie the Sunshine Law and which govern its application is expressed in the preamble to the legislation, which states:

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process [and] that secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society

N.J.S.A. 10:4-7.

The extent to which the courts would go to fulfill and implement the public policies expressed by the Legislature was demonstrated in the 1977 decision in *Polillo v. Deane*, 74 N.J. 562, 379 A.2d 211 (1977), the first New Jersey Supreme Court case involving the Sunshine Law. In *Polillo* the issues before the Supreme Court were the extent to which the Atlantic City Charter Study Commission had violated the Sunshine Law and what remedies should be imposed for violation.

The charter study commission had been established by voter referendum to consider the merits of adopting a new form of government. In performing this function, the commission held meetings and hearings, some of which did not comply fully with the notice requirements of the Sunshine Law. The commission recommended that there be a voter referendum on adopting a “strong mayor” form of government. The referendum was thereafter placed on the ballot, and the voters of Atlantic City overwhelmingly adopted this new form of government.

Even though most of the commission’s meetings had been well-publicized ahead of time and the hearings involved substantial public attendance and participation, the court found that there must be “strict adherence to the letter of law” with respect to the notice requirements of the Sunshine Law. Since strict adherence had not taken place, the court ruled that the vote of the commission to recommend a referendum must be invalidated, along with the voter referendum approving the new form of government. It ordered the commission to “embark again” on its task of considering a new form of government for Atlantic City.

The Supreme Court’s decision in *Polillo* set the tone for all subsequent court decisions on interpretation and application of the Sunshine Law. And to a great extent the lower courts have required “strict adherence to the letter of the law” and have liberally construed the Sunshine Law to accomplish its purpose and the public policy of New Jersey. See N.J.S.A. 10:4-21.

Open Records

I. STATUTE -- BASIC APPLICATION

A. Who can request records?

1. Status of requestor.

Under OPRA, any “citizen of this State” has the right to inspect and copy public records. N.J.S.A. 47:1A-1. Under the common law, the applicant must have an interest in the subject matter of the material sought, but the media’s role as the “eyes and ears of the public” is usually sufficient to confer standing. *Home News v. New Jersey Dept. of Health*, 144 N.J. 446, 454, 539 A.2d 736 (1996).

2. Purpose of request.

Under OPRA, the purpose for requesting the public records is irrelevant. See *Williams v. Board of Education of Atlantic City Public Schools*, 329 N.J. Super. 308, 747 A.2d 809 (App. Div. 2000) cert. denied 165 N.J. 488, 478 A.2d 648. Under the common law, more than citizen status and good faith are necessary when there is a compelling governmental need for confidentiality. *Loigman v. Kimmelman*, 102 N.J. at 105-106 (1986).

3. Use of records.

When records are deemed “government records” under OPRA, no restrictions on subsequent use of the information may be imposed. When the records are obtained under the common law right, the court may impose restrictions. Cf. *McClain v. College Hospital*, 99 N.J. 346, 429 A.2d 991 (1985).

B. Whose records are and are not subject to the act?

1. Executive branch.

In general, all government records are subject to access under OPRA, unless specifically exempted. Certain Executive Branch records have been exempted. The following records maintained by the office of the Governor, or part thereof, shall *not* be deemed to be government records under OPRA:

- a. Any record made, maintained, kept on file or received in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.
- b. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.
- c. All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.
- d. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b), or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the records shall be promptly permitted.

(See Executive Order 26)

Records relating to petitions for executive clemency are not public records under OPRA. (See Executive Order No. 9)

2. Legislative bodies.

A government record shall *not* include information received by a member of the Legislature from a constituent or information obtained by a member of the legislature concerning a constituent, including but

not limited to, information in written form or contained in any e-mail or computer database, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit.

A government record shall also *not* include any memorandum, correspondence, notes, report or other communication prepared by or for the specific use of a member of the Legislature in the course of the member’s official duties, except that this provision shall not apply to an otherwise publicly accessible report that is required by law to be submitted to the Legislature or its members.

See N.J.S.A. 47:1A-1.1

3. Courts.

OPRA does not address court records. However, New Jersey Court Rule 1:38-1 provides that “Court records and administrative records as defined by R. 1:38-2 and R. 1:38-4 respectively and within the custody and control of the judiciary are open for public inspection and copying” with certain specific exceptions, which are to be “narrowly construed in order to implement the policy of open access to records of the judiciary.”

4. Nongovernmental bodies.

OPRA applies to records of any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof. (See N.J.S.A. 47:1A-1.1). Consequently, records of non-governmental bodies are generally not subject to the law. However, there may be circumstances under which a governmental entity is not excused from its OPRA obligations simply because the requested records are not in its possession. See *Burnett v. County of Gloucester*, 415 N.J. Super 506 (2010) (finding that “the settlement agreements at issue here [and in the possession of the County’s insurance broker, one of the County’s insurers, or outside counsel, but not in the possession of the County] were ‘made’ by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.1.”)

5. Multi-state or regional bodies.

The applicability of OPRA to records of multistate bodies has not been decided.

6. Advisory boards and commissions, quasi-governmental entities.

The records of any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards, are subject to OPRA. (See N.J.S.A. 47:1A-1.1.)

C. What records are and are not subject to the act?

1. What kind of records are covered?

All “government records” shall be subject to access unless specifically exempt from such access. “Government record” or “record” means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

(See N.J.S.A. 47:1A-1.1).

2. What physical form of records are covered?

A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains

the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.

(See N.J.S.A. 47:1A-5(d)).

3. Are certain records available for inspection but not copying?

OPRA specifically permits inspection, copying or examination.

(See N.J.S.A. 47:1A-1)

D. Fee provisions or practices.

1. Levels or limitations on fees.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

(See N.J.S.A. 47:1A-5(b)).

2. Particular fee specifications or provisions.

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to the Act is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the rates set forth in D.1 above shall be established in advance by ordinance. The requester shall have the opportunity to review and object to the charge prior to it being incurred.

(See N.J.S.A. 47:1A-5(c)).

3. Provisions for fee waivers.

There is no provision in OPRA for waiver of fees.

4. Requirements or prohibitions regarding advance payment.

OPRA provides that the custodian may require a deposit against costs for reproducing documents sought through an anonymous request, whenever the custodian anticipates that the information requested will cost in excess of \$5 to reproduce. (See, N.J.S.A. 47:1A-5(f)).

5. Have agencies imposed prohibitive fees to discourage requesters?

Fees for copies have been set by statute. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which

all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

(See N.J.S.A. 47:1A-5(b)). Under certain circumstances a special service charge may be imposed as follows:

c. Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requester shall have the opportunity to review and object to the charge prior to it being incurred.

E. Who enforces the act?

A person who is denied access to a government record, at the option of the requester, may institute a proceeding to challenge the custodian's decision by filing an action in Superior Court or file a complaint with the Government Records Council established pursuant to OPRA.

(See N.J.S.A. 47:1A-6)

1. Attorney General's role.

None other than acting as attorney to the Government Records Council.

2. Availability of an ombudsman.

The statute does not provide for an ombudsman. However, N.J.S.A. 47:1A-7 establishes a Government Records Council which is charged with, among other things, establishing an informal mediation program to facilitate the resolution of disputes regarding access to government records.

3. Commission or agency enforcement.

A person who is denied access to a government record may file a complaint with the Government Records Council established pursuant to OPRA. (See N.J.S.A. 47:1A-6).

F. Are there sanctions for noncompliance?

A requester who prevails in any proceeding shall be entitled to a reasonable attorneys' fee. (See N.J.S.A. 47:1A-6). In addition, a public official, officer, employee or custodian who knowingly and willfully violates OPRA 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 the initial violation, and \$5,000 for a third violation occurring within 10 years of an initial violation that. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

(See N.J.S.A. 47:1A-11).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

a. General or specific?

OPRA declares that all government records be subject to public access unless exempt from such access by: (i) OPRA, (ii) any other statute, (iii) resolution of either or both houses of the Legislature, (iv)

regulation promulgated under the authority of any statute or Executive Order of the Governor; (v) Executive Order of the Governor; (vi) Rules of Court; (vii) any federal law; (viii) federal regulation; or (ix) court order. (See N.J.S.A. 47:1A-1).

Specifically OPRA also exempts the following from the definition of “government record”:

- Inter-agency or intra-agency advisory; consultative, or deliberative material. (See definition of “Government record,” N.J.S.A. 47:1A-1.1)
- Information received by a member of the State Senate or Assembly from or regarding a constituent. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Memoranda, letters, notes, reports and any other communication prepared for the use of a member of the State Senate or Assembly. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Photographs, negatives and copies thereof, or videotapes, of a decedent relating to a post mortem examination or autopsy. (See definition of “Government record,” N.J.S.A. 47:1A-1.1 and note that there are exceptions to this exception.)
- Criminal investigatory records. (See definition of “Government record,” N.J.S.A. 47:1A-1.1, and note that there are exceptions to this exception as set forth in N.J.S.A. 47:1A-3.b.)
- Victims records, except that the victim may have access to his/her own records, (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Trade secrets; proprietary commercial or financial information. This includes data processing software obtained pursuant to a licensing agreement prohibiting disclosure. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Records within the attorney-client privilege. (See definition of “Government record,” 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. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Buildings and facilities emergency procedures and security information which, if disclosed would jeopardize security of the building or facility or persons therein. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Security and surveillance measures which, if disclosed, would create safety risks for persons, property, electronic data or software. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Information that would give an advantage to competitors or bidders. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Information pertaining to sexual-harassment complaints filed with public employers. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Information pertaining to any grievance filed by or against an individual. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Information pertaining to collective negotiations, including documents containing negotiating strategies. (See definition of “Government record,” N.J.S.A. 47:1A-1.1 and note that it is assumed “collective negotiations” means “collective bargaining negotiations.”)
- Communications with the public agency’s insurance carrier, administrative service organization or risk management office. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).
- Information to be kept confidential pursuant to court order. (See definition of “Government record,” N.J.S.A. 47:1A-1.1).

- The portion of any document disclosing Social Security, credit card, unlisted phone or driver license numbers. (See definition of “Government record,” N.J.S.A. 47:1A-1.1 but note that there are numerous exceptions to this exception.)

- Various records of public institutions of higher education:

- (a) Pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

- (b) Test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination;

- (c) Records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor’s identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;

- (d) Valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access;

- (e) Information contained on individual admission applications; and

- (f) Information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

- Biotechnology trade secrets as restricted by federal law. (See N.J.S.A. 47:1A-1.2.)

- Personal information regarding the victim of a crime or the victim’s family when the information is being sought by the convict who wronged the victim or by anonymous request. (See N.J.S.A. 47:1A-2.2)

- Files maintained by the Office of the Public Defender that relate to the handling of a case. (See N.J.S.A. 47:1A-5.k.)

- Records exempt from disclosure under any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under authority of any statute or Executive Order; Executive Order; Rules of Court or; federal law, regulation or order. (See N.J.S.A. 47:1A-9.a.)

- Records heretofore exempt from disclosure pursuant to any executive or legislative privilege or grant of confidentiality established or recognized by State Constitution of this State, statute, court rule or case law. (See N.J.S.A. 47:1A-9.b.)

- Personnel and pension records of state and local employees except for the employee’s name, title, position, salary, payroll record, length of service, date of termination, reason for termination, amount and type of pension received, and other employee background information which discloses specific experiential, educational or medical qualifications for government employment or for receipt of a public pension, but excluding detailed medical or psychological information (Byrne Executive Order No. 11 (1974));

- Executive Orders:

- (a) Executive Order No. 9 issued by Governor Richard J. Hughes

- (b) Executive Order No. 48 issued by Governor Richard J. Hughes

- (c) Executive Order No. 11 issued by Governor Brendan Byrne

(d) Executive Order No. 69 issued by Governor Christine Todd Whitman

(e) Executive Order No. 18 issued by Governor James McGreevey

(f) Executive Order No. 21 issued by Governor James McGreevey

(g) Executive Order No. 26 issued by Governor James McGreevey

(h) Executive Order No. 47 issued by Governor Chris Christie (note that Executive Order 47 provides in part “[a]ny provision of Executive Order No. 21 (2002) and Executive Order No. 26 (2002) that applies to any exemption initially proposed by an agency in the July 1, 2002 a New Jersey Register, is hereby rescinded.)

b. Mandatory or discretionary?

There is discretionary language in N.J.S.A. 47:1A-3. Specifically, where records sought pertain to an investigation in progress, access *may* be denied if disclosure would “be inimical to the public interest.” (See N.J.S.A. 47:1A-3).

c. Patterned after federal Freedom of Information Act?

No.

2. Discussion of each exemption.

a. *State statutory exemptions.* Scattered throughout the 59 Titles of the New Jersey Statutes are numerous provisions requiring confidentiality of public records. See, e.g., N.J.S.A. 30:4-24.3 (dealing with confidentiality of mental patient records); N.J.S.A. 45:9-42.39 (dealing with confidentiality of clinical laboratory reports); N.J.S.A. 18A:73-43.2 (dealing with confidentiality of library users’ records). Review of the relevant statutes dealing with the subject matter of the records sought is necessary in each case to determine if there is a confidentiality provision which bars access.

b. *Resolutions of the Legislature.* There appear to be no resolutions of the Legislature requiring confidentiality of any specific records.

c. *Executive Orders of the Governor.* By virtue of Executive Orders of six Governors, the following records are not subject to public inspection and copying under the Right to Know Law:

(i) All examinations conducted by state and local government agencies (Hughes Executive Order No. 9 (1963));

(ii) Personnel and pension records of state and local employees except for the employee’s name, title, position, salary, payroll record, length of service, date of termination, reason for termination, amount and type of pension received, and other employee background information which discloses specific experiential, educational or medical qualifications for government employment or for receipt of a public pension, but excluding detailed medical or psychological information (Byrne Executive Order No. 11 (1974));

(iii) Records which would disclose information regarding illegitimacy (Hughes Executive Order No. 9 (1963));

(iv) Records concerning morbidity, mortality and reportable diseases of named persons (*Id.*);

(v) Criminal investigation records and centralized criminal records, except that the following information shall be released as soon as practical after a crime has been committed:

(1) where no arrest has been made, information as to the type of crime, time, location and type of weapon, if any;

(2) if an arrest has been made, information as to the name, address and age of any victim unless the victim’s family has not been notified or if release of the information would jeopardize the safety of the victim or the victim’s family or impair an ongoing investigation;

(3) if an arrest has been made, information as to the suspect’s name, age, residence, occupation, marital status and similar background information, the charges brought against the suspect, the amount of bail, and the circumstances surrounding the arrest, including the time and place of arrest, any resistance by the suspect, possession and use of weapons by the arresting officers and the suspect, the identity of the arresting officers, and the length of the investigation (Keane Executive Order No. 123 (1985));

(vi) Tax returns (Hughes Executive Order No. 9 (1963));

(vii) Records relating to petitions for executive clemency. (*Id.*)

(viii)

(a) Any record made, maintained, kept on file or received by the Office of the Governor in the course of its official business which is subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law.

(b) All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.

(c) All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed.

(d) If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted. (McGreevey Executive Order No. 26)

(ix) No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure. (McGreevey Executive Order No. 26)

(x) The exemptions from public access that have been proposed by the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs, shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act. (Christie Executive Order No. 47)

d. Information concerning individuals as follows:

(i) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

(ii) Information in a personal income or other tax return;

(iii) Information describing a natural person’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.

e. Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.

f. Records of a department or agency in the possession of another

department or agency when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 *et seq.* and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

g. Records of a department or agency held by the Office of Information Technology (OIT) or the State Records Storage Center of the Division of Archives and Records Management (DARM) in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of the department or agency and be accessible for inspection or copying only through a request to the proper custodian of the department or agency. In the event that records of a department or agency have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives and requests for access to them shall be submitted directly to the State Archives. (McGreevey Executive Order No. 26)

h. *Rules of Court.* Court records which are required by New Jersey Court Rules to be kept confidential include:

The following court records are excluded from public access:

(a) **General.** Records required to be kept confidential by statute, rule, or prior case law consistent with this rule, unless otherwise ordered by a court. These records remain confidential even when attached to a non-confidential document.

(b) **Internal Records.**

(1) Notes, memoranda, draft opinions, or other working papers maintained in any form by or for the use of a justice, judge, or judiciary staff member in the course of performing official duties, except those notes, not otherwise excluded from public access under this rule, that are required by rule or law, e.g., R. 7:2-1(e), to be taken as part of the record of the proceeding;

(2) Records of consultative, advisory, or deliberative discussions pertaining to the rendering of decisions or the management of cases.

(c) **Records of Criminal and Municipal Court Proceedings.**

(1) Discovery materials provided to the Criminal Division Manager's office by the prosecutor pursuant to R. 3:9-1 and R. 3:13-3;

(2) Writs to produce prisoners pending execution of the writ;

(3) Indictments sealed pursuant to R. 3:6-8(a);

(4) Records relating to grand jury proceedings pursuant to R. 3:6-7 except as provided by R. 3:6-6(b) and R. 3:6-9(d);

(5) Records relating to participants in drug court programs and programs approved for operation under R. 3:28 (Pre-trial Intervention), and reports made for a court or prosecuting attorney pertaining to persons enrolled in or applications for enrollment in such programs, but not the fact of enrollment and the enrollment conditions imposed by the court;

(6) Victim statements unless placed on the record at a public proceeding;

(7) Expunged records pursuant to N.J.S.A. 2C:52-15;

(8) Reports of the Diagnostic Center to the extent provided under R. 3:21-3;

(9) Records relating to child victims of sexual assault or abuse pursuant to N.J.S.A. 2A:82-46;

(10) Search warrants pursuant to R. 3:5-4 and the affidavit or testimony upon which a warrant is based, except as provided in Rs. 3:5-6(c) and 3:13-3;

(11) Documents, records and transcripts related to proceedings and hearings required by the Supreme Court pursuant to *Doe v. Poritz*, 142 N.J. 1, 39 (1995), or subsequent orders of the Court;

(12) Names and addresses of victims or alleged victims of domestic violence or sexual offenses.

(d) **Records of Family Part Proceedings.**

(1) Family Case Information Statements required by R. 5:5-2 and Financial Statements in Summary Support Actions required by R. 5:5-3, including all attachments; (2) Confidential Litigant Information Sheets pursuant to R. 5:4-2(g);

(3) Medical, psychiatric, psychological, and alcohol and drug dependency records, reports, and evaluations in matters related to child support, child custody, or parenting time determinations;

(4) Documents, records and transcripts related to proceedings and hearings required by the Supreme Court pursuant to *Doe v. Poritz*, 142 N.J. 1, 39 (1995), or subsequent orders of the Court;

(5) Juvenile delinquency records and reports pursuant to R. 5:19-2 and N.J.S.A. 2A:4A-60;

(6) Records of Juvenile Conference Committees to the extent provided under R. 5:25-1(e);

(7) Expunged juvenile records pursuant to N.J.S.A. 2A:4A-62f and 2C:52-15;

(8) Sealed juvenile records pursuant to N.J.S.A. 2A:4A-62;

(9) Domestic violence records and reports pursuant to N.J.S.A. 2C:25-33;

(10) Names and addresses of victims or alleged victims of domestic violence or sexual offenses;

(11) Records relating to child victims of sexual assault or abuse pursuant to N.J.S.A. 2A:82-46;

(12) Records relating to Division of Youth and Family Services proceedings held pursuant to R. 5:12;

(13) Child custody evaluations, reports, and records pursuant to R. 5:8-4, R. 5:8B, N.J.S.A. 9:2-1, or N.J.S.A. 9:2-3;

(14) Paternity records and reports, except for the final judgments or birth certificates pursuant to N.J.S.A. 9:17-42;

(15) Records and reports relating to child placement matters pursuant to R. 5:13-8(a);

(16) Adoption records and reports pursuant to N.J.S.A. 9:3-52;

(17) Records of hearings on the welfare or status of a child, to the extent provided under R. 5:3-2.

(e) Guardianship records and reports maintained by the Surrogate and by the Chancery Division, Probate Part, except the guardianship index, of which only the following information shall be available for public access: (1) minor's or incapacitated person's name, (2) name of the municipality where the minor or incapacitated person resided when the guardianship was created, (3) name of the guardian, (4) docket number, (5) date of the judgment appointing the guardian, and (6) date of the guardian's qualification.

All guardianship records and reports, however, are available to the incapacitated person and the minor upon reaching majority;

the incapacitated person's spouse, civil union partner, or domestic partner; the minor's or incapacitated person's parents and siblings; any adult children of the incapacitated person; the guardian appointed in the action; and any attorneys appearing in the guardianship action on behalf of these persons.

Further, any person may inspect and copy the following guardianship file documents: the guardianship judgment, the Letters of Guardianship, and any subsequent order dealing with the powers or limitations of the guardian, provided any financial information contained in these documents, including information on the amount of the bond, is reacted prior to the documents being made available for review or copying. Any individual or entity seeking other records must demonstrate before a Superior Court judge a special interest in the matter.

(f) Records of Other Proceedings.

(1) Records pertaining to mediation sessions and complementary dispute resolution proceedings pursuant to R. 1:40-4(d) and R. 7:8-1, but not the fact that mediation has occurred;

(2) Records and transcripts of civil commitment proceedings, pursuant to N.J.S.A. 30:4-24.3, N.J.S.A. 30:4-27.27(c), N.J.S.A. 30:4-82.4h, R. 4:74-7, and R.4:74-7A;

(3) Police investigative reports, unless admitted into evidence or submitted to the court in support of a motion, brief, or other pleading;

(4) Records that are impounded, sealed pursuant to R. 1:38-11, or subject to a protective order pursuant to R. 4:10-3;

(5) Criminal, Family, and Probation Division records pertaining to any investigations and reports made by court staff or pursuant to court order for a court or pertaining to persons on probation;

(6) Family, Finance and Probation Division records containing information pertaining to persons receiving or ordered to pay child support, including the child(ren); custodial parents; non-custodial parents; legal guardians; putative fathers; family members and any other individuals for whom information may be collected and retained by the court in connection with child support cases subject to Title IV-D of the Social Security Act, 42 U.S.C. 651 et seq. and applicable state and federal statutes, but not the complaint or orders in such cases.

(7) Records maintained by the Judiciary that contain identifying information about a person who has or is suspected of having AIDS or HIV infection, pursuant to N.J.S.A. 26:5C-7, except as provided in N.J.S.A. 26:5C-8 and -9;

(8) Records of appeals from the Division of Developmental Disabilities in accordance with N.J.S.A. 30:4-24.3.

(See Rule 1:38-3).

i. *Federal laws, regulations or orders.* This exemption incorporates by reference any provision of the United States Code or the Code of Federal Regulations or any federal executive, court or administrative agency orders which require records kept by state or local agencies to remain confidential. See, e.g., 42 U.S.C. § 602(a) (9), requiring confidentiality of records concerning recipients of Aid to Families with Dependent Children; 42 U.S.C. § 247c, requiring confidentiality of AIDS patient records. Review of all relevant federal statutes, regulations and orders dealing with the subject matter of the records sought is necessary in each case to ascertain if there is a confidentiality provision that bars access.

j. *State regulations.* There are numerous confidentiality provisions scattered throughout the New Jersey Administrative Code. See, e.g.,

N.J.A.C. 6:3-2.6, limiting release of student records to "authorized organizations, agencies, and persons"; N.J.A.C. 10:49-1.22, providing for confidentiality of Medicaid records; N.J.A.C. 10:37-6.79, barring access to mental health records. Review of the regulations dealing with the specific subject matter of the records sought is necessary in each case.

B. Other statutory exclusions.

In *Asbury Park Press v. Ocean County*, 374 N.J. Super. 312, (Law Div. 2004), The Law Division held that an OPRA request for a 911 tape and transcript relating to a double homicide were properly denied. The court concluded that the Legislature intended to provide protection against disclosure in those instances in which a person had a reasonable expectation of privacy. The court's decision appeared to be based on the level of distress of the caller who died at the hand of his son.

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

N.J.S.A. 47:1A-9(a) provides that "[t]he provisions of this act, P.L.2001, c.404 (C.47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); any other statute; regulation of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order."

D. Are segregable portions of records containing exempt material available?

The courts generally will permit access to those portions of records which do not contain confidential or exempt material. See *Southern New Jersey Newspapers Inc. v. Township of Mt. Laurel*, 141 N.J. 56, 77, 660 A.2d 1173 (1995); *Red Bank Register Inc. v. Board of Education of Long Branch*, 206 N.J. Super. 1, 501 A.2d 985 (App. Div. 1985).

E. Homeland Security Measures.

New Jersey's open public records law exempts both: "Buildings and facilities emergency procedures and security information which, if disclosed, would jeopardize security of the building or facility or persons therein . . . [and] Security and surveillance measures which, if disclosed, would create safety risks for persons, property, electronic data, or software." See definition of "government record," N.J.S.A. 47:1A

III. STATE LAW ON ELECTRONIC RECORDS

A. Can the requester choose a format for receiving records?

A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. (See N.J.S.A. 47:1A-5(d)).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

Under OPRA, agencies are required to disclose only "identifiable" governmental records not otherwise exempt; wholesale requests for general information, to be analyzed, collated, and compiled by the responding government entity, are not encompassed by OPRA. (See *MAG Entertainment v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534 (App. Div. 2005)).

C. Does the existence of information in electronic format affect its openness?

No. The definition of a "government record" includes material stored or maintained electronically. (See N.J.S.A. 47:1A-1.1).

D. How is e-mail treated?

As long as the e-mail has been made, maintained or kept on file in the course of official business, as set forth in OPRA, and as long as no specific exemptions apply, the e-mail would constitute a government record subject to access under OPRA. (See also *Meyers v. Borough of Fairlawn*, GRC 2005-127, in which the Government Records Council determined that to the extent that records fall within the definition of “government records” under OPRA and are maintained in the personal e-mail account of the Mayor, they must be released under OPRA.)

1. Does e-mail constitute a record?

Yes, e-mail constitutes a government record. OPRA defines a government record broadly as any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

“As is the case with other forms of communication, e-mails fall within the scope of this expansive provision.” (See *McGee v. Township of East Amwell*, 416 N.J. Super. 602, 614 (App. Div. 2010).)

2. Public matter on government e-mail or government hardware

Although the term “public matter” is not defined in OPRA, OPRA defines a government record broadly as any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

3. Private matter on government e-mail or government hardware

A private matter on government e-mail is not a government record under OPRA unless it was made, maintained or kept on file “in the course of ...official business” or “received in the course of...official business.”

4. Public matter on private e-mail

Although the term “public matter” is not defined in OPRA, OPRA defines a government record broadly, *regardless of where such record is made, stored or maintained*, as any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. Thus, if the records falls within this definition, it would be subject to OPRA even if made, stored and/or maintained on private e-mail.

5. Private matter on private e-mail

Although the term “private matter” is not defined in OPRA, such a matter on private e-mail would not constitute a government record under OPRA unless it was made, maintained or kept on file “in the

course of ...official business” or “received in the course of...official business.”

E. How are text messages and instant messages treated?

1. Do text messages and/or instant messages constitute a record?

Although there are no reported cases in New Jersey dealing with text messages or instant messaging in this context, there is no reason to believe that they would be treated any differently than e-mail.

2. Public matter message on government hardware.

Although there are no reported cases in New Jersey dealing with text messages or instant messaging in this context, there is no reason to believe that they would be treated any differently than e-mail.

3. Private matter message on government hardware.

Although there are no reported cases in New Jersey dealing with text messages or instant messaging in this context, there is no reason to believe that they would be treated any differently than e-mail.

4. Public matter message on private hardware.

Although there are no reported cases in New Jersey dealing with text messages or instant messaging in this context, there is no reason to believe that they would be treated any differently than e-mail.

5. Private matter message on private hardware.

Although there are no reported cases in New Jersey dealing with text messages or instant messaging in this context, there is no reason to believe that they would be treated any differently than e-mail.

F. How are social media postings and messages treated?

Although there are no reported cases in New Jersey dealing with social media postings and messages, there is no reason to believe that they would be treated any differently than e-mail.

G. How are online discussion board posts treated?

Although there are no reported cases in New Jersey dealing with online discussion board posts in this context, there is no reason to believe that they would be treated any differently than e-mail.

H. Computer software

1. Is software public?

N.J.S.A. 47:1A-1.1 provides in pertinent part:

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented:

trade secrets and proprietary commercial or financial information obtained from any source. *For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;*

(Emphasis added.)

2. Is software and/or file metadata public?

With regard to software, N.J.S.A. 47:1A-1.1 provides in pertinent part:

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented:

trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;

With regard to metadata, although there are no reported cases in New Jersey on the accessibility of metadata under OPRA, OPRA defines a “government record” broadly as any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, *information stored or maintained electronically* or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. Thus, it appears that metadata would fall within this definition and would be considered a government record, subject to access, unless it falls within a particular exemption.

I. How are fees for electronic records assessed?

Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs. *See* N.J.S.A. 47:1A-5(b).

J. Money-making schemes.

1. Revenues.

Rates for copies are set by statute as follows:

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

(*See* N.J.S.A. 47:1A-5(b)).

2. Geographic Information Systems.

A Geographic Information System (“GIS”) falls under OPRA’s definition of a government record as “data processed or image processed document[s], [and] information stored or maintained electronically,” (*see Tombs v. Brick Township Municipal Utilities Authority*, 2006 N.J. Super. Unpub. LEXIS 2188 (December 7, 2006)); however the information may be otherwise exempt from disclosure. *See, e.g., Tombs, supra*, (finding that the digital copy format of the GIS topographic mapping data was made unavailable by virtue of protected critical infrastructure information status granted by the Department of Homeland Security to the material pursuant to federal law, declaring that it would be handled and safeguarded as required by the [Critical Infrastructure

Information Act] and 6 C.F.R. 29, namely that such material shall not be made available pursuant to any State or local law requiring disclosure of records or information.” *Id.* at 3.

K. On-line dissemination.

N.J.S.A. 47:1A-5(d) provides:

d.A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be 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.

IV. RECORD CATEGORIES -- OPEN OR CLOSED

A. Autopsy reports.

Generally, cause-of-death information is confidential. *See* N.J.A.C. 8:2A-1.2. Pursuant to N.J.S.A. 47:1A-1.1 any copy, reproduction or facsimile of any photograph, negative or print, including instant photograph and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner is specifically exempted from the definition of government record. New Jersey courts have permitted public access to autopsy reports and cause-of-death information on death certificates in limited circumstances under the common law. *See Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 610 A.2d 985 (App. Div. 1992); *Home News v. New Jersey Dept. of Health*, 144 N.J. 446, 677 A.2d 195 (1996).

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

1. Rules for active investigations.

N.J.S.A. 47:1A-3(a) provides that where it appears that the requested record(s) pertain to an investigation in progress by any public agency, the right of access may be denied if access to such record(s) shall be inimical to the public interest. This provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with OPRA requests.

2. Rules for closed investigations.

N.J.S.A. 47:1A-3(a) only refers to investigations in progress. There is no exemption for records relating to a closed investigation. Those qualify as “government records.”

C. Bank records.

Semi-annual reports of a state-chartered bank are public records. N.J.S.A. 17:9A-256. Special reports of state-chartered banks required to be filed by the Commissioner of Banking are not. N.J.S.A. 17:9A-264. Annual reports and audits of state-chartered savings and loans are public records. N.J.S.A. 17:12B-171. Reports of examinations of sav-

ings and loans by the Commissioner are confidential. N.J.S.A. 17:12B-172. Annual reports of the condition of state-chartered credit unions are public records. N.J.S.A. 17:13-111. See *Twiss v. State of New Jersey Dept. of Treasury*, 124 N.J. 461, 591 A.2d 913 (1991) (information regarding bank accounts which escheat to the state is confidential).

D. Budgets.

Home News v. Board of Educ. of Borough of Spotswood, 286 N.J. Super. 380 (App. Div. 1996) involved a request for copies of the proposed school district budget and supporting documentation. The Court held that under the Right To Know Law, which preceded OPRA and defined a public record as one that is *required* by law to be made, maintained, or kept on file by a public body, the draft budget was not a government record, as there was no requirement that it be made, maintained or kept on file.

OPRA amended the definition of “government record” by deleting the reference to records that are “*required*” to be made, maintained or kept on file. Therefore, under OPRA, draft budgets, as well as, final budgets are “government records.” However, the governing body may assert that portions of the draft budgets should be redacted, if they fall under the “advisory, consultative and deliberative” exemption from access provided for in N.J.S.A. 47:1A-1.

E. Business records, financial data, trade secrets.

N.J.S.A. 47:1A-1.1 exempts from access trade secrets and proprietary commercial or financial information. Bills to public entities from providers of goods and services, including attorneys and other professionals, are public records under OPRA *Courier Post v. Lenape*, see also *Keddie v. Rutgers*, 286 N.J. Super. 285, 669 A.2d 247 (App. Div. 1996); *Hunterdon County Policemen’s Benevolent Ass’n v. Township of Franklin*, 286 N.J. Super. 389, 669 A.2d 299 (App. Div. 1996). However, detailed telephone and car phone toll billing records of public officials which reveal the telephone numbers called are not public records. *North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders*, 127 N.J. 9, 601 A.2d 693 (1992).

F. Contracts, proposals and bids.

N.J.S.A. 47:1A-1.1 exempts from the definition of government record information that, if disclosed, would give an advantage to competitors or bidders. All advertisements for bids, and bids when opened and all contracts for the purchase of goods or services are public records. N.J.S.A. 47:1A-11-4, 14 and 23.

Pursuant to *Asbury Park Press v. County of Monmouth et seq.*, 201 N.J. 5 (2010), OPRA requires disclosure of settlement agreements between public entities and former employees.

G. Collective bargaining records.

All final collective bargaining contracts with public employees are public records. N.J.S.A. 34:13A-8.2. The records of a mediator or arbitrator in a public employee labor dispute may be kept confidential. N.J.S.A. 34:13A-16.

H. Coroners reports.

Generally, cause-of-death information is confidential. See N.J.A.C. 8:2A-1.2. Pursuant to N.J.S.A. 47:1A-1.1 any copy, reproduction or facsimile of any photograph, negative or print, including instant photograph and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner is specifically exempted from the definition of government record. New Jersey courts have permitted public access to autopsy reports and cause-of-death information on death certificates in limited circumstances under the common law. See *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 610 A.2d 985 (App. Div. 1992); *Home News v. New Jersey Dept. of Health*, 144 N.J. 446, 677 A.2d 195 (1996).

I. Economic development records.

There is no specific statute or case decision dealing with these records. If they meet the definition of “Government Record” in OPRA then they are accessible. To the extent they contain any trade secrets, proprietary commercial or financial information, that information can be redacted, pursuant to N.J.S.A. 47:1A-1, prior to the production of the records.

J. Election records.

1. Voter registration records.

N.J.S.A. 19:31-3.2 provides:

a. A person who is (1) a victim of domestic violence who has obtained a permanent restraining order against a defendant pursuant to section 13 of the “Prevention of Domestic Violence Act of 1991,” P.L. 1991, c. 261 (C. 2C:25-29) and fears further violent acts by the defendant, or (2) a victim of stalking, or member of the immediate family of such a victim as defined by paragraph (3) of subsection a. of section 1 of P.L. 1992, c. 209 (C. 2C:12-10), who is protected under the terms of a permanent restraining order issued pursuant to section 3 of P.L. 1996, c. 39 (C. 2C:12-10.1) and who fears death or bodily injury from the defendant against whom that order was issued, shall be allowed to register to vote without disclosing the person’s street address. Such a person shall leave the space for a street address on the original permanent registration form blank and shall, instead, attach to the form a copy of the permanent restraining order and a note which indicates that the person fears future violent acts by the defendant and which contains a mailing address, post office box or other contact point where mail can be received by the person. Upon receipt of the person’s voter registration form, the commissioner of registration in all counties having a superintendent of elections, and the county board of elections in all other counties, shall provide the person with a map of the municipality in which the person resides which shows the various voting districts. The person shall indicate to the commissioner or board, as appropriate, the voting district in which the person resides and shall be permitted to vote at the polling place for that district. If such a person thereafter changes residences, the person shall so inform the commissioner or board by completing a new permanent registration form in the manner described above.

b. Any person who makes public any information which has been provided by a victim of domestic violence, or by a victim of stalking or the family member of such a victim, pursuant to subsection a. of this section concerning the mailing address, post office box or other contact point of the victim or family member or the election district in which the victim or family member resides is guilty of a crime of the fourth degree.

N.J.S.A. 19:31-6.4(d) provides that “the commissioner of registration shall furnish such registration forms upon request in person to any person or organization in such reasonable quantities as such person or organization shall request. The commissioner shall furnish no fewer than two such forms to any person upon request by mail or by telephone.”

N.J.S.A. 19:31-10 provides:

The original and duplicate registration forms when filled out shall be filed alphabetically by districts at the office of the commissioner in separate sets of locked binders, one for the permanent office record and the other for use in the polling places on election days. Each set of the locked binders of original and duplicate registration forms shall consist of two volumes for each election district to be known as volume I and volume II. Volume I shall contain an index alphabetically arranged beginning with the letter “A” and ending with the letter “K”, and volume II shall contain a similar index beginning with the letter “L” and ending with the letter “Z”. In filing the forms there shall be inserted after the original and duplicate registration forms of each registrant a record of voting form with the corresponding serial number

and the name and address of the registrant thereon. The binders containing the duplicate registration forms and the corresponding record of voting forms shall constitute and be known as the signature copy registers.

The original registration forms shall not be open to public inspection except during such period as the duplicate registration forms are in process of delivery to or from the district boards or in the possession of such district boards. The original registration forms shall not be removed from the office of the commissioner except upon the order of a court of competent jurisdiction. The signature copy registers shall at all times, except during the time as above provided and subject to reasonable rules and regulations be open to public inspection.

N.J.S.A. 19:31-18.1 provides:

a. The county clerk in all counties shall cause copies of the registry lists, certified and transmitted under R.S.19:31-18, to be printed, and shall furnish to any voter applying for the same such copies, charging therefore \$ 0.25 per copy of the list of voters of each election district. The clerk shall also furnish five printed copies thereof to each district board, which shall within two days post two such registry lists, one in the polling place and one in another conspicuous place within the election district. The county clerk shall also forthwith deliver to the superintendent of elections of the county, if any there be, and to the chairmen of the county committees of each of the several political parties in the county, five copies of the lists of voters of each election district in the county; and to the municipal clerk of each of the municipalities in the county five copies of the lists of voters of each election district in such municipality; and to the county board 10 copies of the lists of voters of each election district in each of such municipalities. The county clerk shall also, upon the request of the chairman of the State committee of any of the several political parties, but not more than once in each calendar year, forthwith deliver a copy of the lists of voters of each election district in each of the municipalities in his county. In no case shall a list of registered voters furnished pursuant to this section include voter signatures. The county clerk shall satisfy the request by delivery of a computer-generated or electronic copy of the list for the county from the Statewide voter registration system.

b. The commissioner of registration shall furnish a computer-generated or electronic copy of a list of registered voters in any or all election districts in the county to any voter requesting it, for which copy such commissioner shall make a charge which shall be uniform in any calendar year and which shall reflect only the cost of reproducing the list, but which in any case shall not exceed \$ 375.

c. No person shall use voter registration lists or copies thereof prepared pursuant to this section as a basis for commercial or charitable solicitation of the voters listed thereon. Any person making such use of such lists or copies thereof shall be a disorderly person, and shall be punished by a fine not exceeding \$ 500.00.

2. Voting results.

N.J.S.A. 19:31-23 provides:

Following each election the commissioner shall cause the record of voting as shown on the record of voting forms in the signature copy registers or, in counties in which polling records are used in place of those signature copy registers pursuant to section 2 of P.L.1994, c.170 (C.19:31-3.3), as shown in the polling records, to be entered on the record of voting forms in the original registration binders and the Statewide voter registration system. An entry of any record of voting which shall have been made in the system shall be retained for a period of not less than ten years following the election at which the vote so recorded was cast.

K. Gun permits.

The licenses/permits are public records but they are not open to inspection. They are exempt from disclosure by attorney general regulations.

L. Hospital reports.

Any reports which include individual patient information generally are confidential.

M. Personnel records.

N.J.S.A. 47:1A-10 provides that the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record;

personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

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, shall be a government record.

1. Salary.

See above.

2. Disciplinary records.

See above.

3. Applications.

See above.

4. Personally identifying information.

See above.

5. Expense reports.

See above.

6. Other.

See above.

N. Police records.

1. Accident reports.

N.J.S.A. 47:1A-1.1 provides that a copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner, is not a government record, except:

when used in a criminal action or proceeding in this State which relates to the death of that person,

for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,

for use in the field of forensic pathology or for use in medical or scientific education or research, or

for use by any law enforcement agency in this State or any other state or federal law enforcement agency;

N.J.S.A. 39:4-131 provides, in relevant part, that accident reports required to be forwarded by law enforcement officers and the information contained therein shall not be privileged or held confidential. Every citizen of this State shall have the right, during regular business hours and under supervision, to inspect and copy such reports and shall also have the right in person to purchase copies of the reports at the same fee established by section 6 of P.L.2001, c.404 (C.47:1A-5). If copies of reports are requested other than in person, an additional fee of up to \$ 5.00 may be added to cover the administrative costs of the report. Upon request, a police department shall send an accident report to a person through the mail or via fax as defined in section 2 of P.L.1976, c.23 (C.19:59-2). The police department may require the person requesting the report to provide a completed request form and the appropriate fee prior to faxing or mailing the report. The police department shall provide the person requesting the report with the option of submitting the form and providing the appropriate fee either in person, through the mail, or via fax as defined in section 2 of P.L.1976, c.23 (C.19:59-2).

The provisions of any other law or regulation to the contrary notwithstanding, reports obtained pursuant to this act shall not be subject to confidentiality requirements except as provided by section 28 of P.L.1960, c.52 (C.2A:84A-28).

When a motor vehicle accident results in the death or incapacitation of the driver or any passenger, the law enforcement officer responsible for notifying the next of kin that their relative is deceased or incapacitated, also shall inform the relative, in writing, how to obtain a copy of the accident report required by this section and the name, address, and telephone number of the person storing the motor vehicle pursuant to section 1 of P.L.1964, c.81 (C.39:10A-1).

2. Police blotter.

Police incident logs constitute “Government records” under OPRA and are not exempt as criminal investigatory records because there is no criminal investigation at the time a call is made and recorded in the incident log.

3. 911 tapes.

911 tapes fall within the definition of a “government record” under OPRA. Because 911 tapes are required by law to be made and kept, they do not qualify as a criminal investigatory record under OPRA. 911 tapes do not become cloaked with confidentiality simply because they become part of a criminal investigation. *Serrano v. South Brunswick*, 358 N.J. Super. 352 (App. Div. 2003). They are subject to the analysis set forth in N.J.S.A. 47:1A-3(a).

In *Asbury Park Press v. Ocean County Prosecutor’s Office*, 374 N.J. Super. 312 (Law Div 2004), the court concluded that the pain family members of the victim who called 911 would suffer upon the release of the call required that it be confidential. Even a redacted version of a transcript, deleting the victim’s side of the conversation, would have impermissibly violated the expectation of privacy, because much of what the dispatcher said simply repeated, to obtain confirmation, what the victim had previously said.

4. Investigatory records.

N.J.S.A. 47:1A-1.1 defines “Criminal Investigatory Record” as “a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1 also states that “Criminal Investigatory Records” are not “Government Records.”

N.J.S.A. 47:1A-3(b) provides that the following *information* (not

records) concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

1. where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
2. if an arrest has been made, information as to the name, address and age of any victims. Exceptions to this are:
 - (a) when there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim; or
 - (b) where the release of the names of any victim would be contrary to existing law or court rule.

In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim’s family, and the integrity of any ongoing investigation, shall be considered;

3. if an arrest has been made, information as to the defendant’s name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or court rule;
4. information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
5. information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
6. information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
7. information as to circumstances surrounding bail, whether it was posted and the amount thereof.

Where it shall appear that the information requested will jeopardize the safety of any person or any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.

a. Rules for active investigations.

See explanation for N(4) above.

b. Rules for closed investigations.

See explanation for N(4) above.

Although criminal investigatory records are exempt under OPRA, closed criminal investigatory records may be accessible under the common law right to know. There the court will engage in the common law balancing, weighing the interest in access against the interest in confidentiality. Because the investigation is closed the interest in confidentiality is diminished, increasing the chances that the court will find in favor of access. *See, Shuttlesworth v. City of Camden*, 258 N.J. Super. 573 (App. Div. 1992).

5. Arrest records.

See explanation for N(4) above.

6. Compilations of criminal histories.

Exemption 7(C) of the Freedom of Information Act (FOIA), codi-

fied at 5 U.S.C.S. § 552(b)(7)(C), requires the court to balance the privacy interest in maintaining the practical obscurity of the rap sheets against the public interest in their release. See, *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989).

7. Victims.

Pursuant to N.J.S.A. 47:1A-1.1, victims' records are not government records, except that a victim of a crime shall have access to the victim's own records.

N.J.S.A. 47:1A-1.1 contains the following definitions:

"Victim's record" means an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records.

"Victim of a crime" means a person who has suffered personal or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime, or if such a person is deceased or incapacitated, a member of that person's immediate family.

N.J.A.C. 10A:22-2.1 provides:

(a) Pursuant to N.J.S.A. 47:1A-2.2, a person convicted of any indictable offense under the laws of this State, any other state or the United States shall be denied access to a government record if the record contains personal information pertaining to the person's victim(s) or family member(s) of a victim(s).

(b) An exception to (a) above may be made only if a court, upon motion by the requester or his or her representative, has determined that the information is necessary to assist in the defense of the requester. The inmate or representative thereof shall submit the determination by the court to the custodian of records for review and release authorization determination.

8. Confessions.

A confession that has been admitted into evidence is accessible to the public. Prior to being admitted into evidence in a court proceeding, a confession is part of a criminal investigatory file and is exempt from the definition of "government record" under OPRA.

9. Confidential informants.

The identities of confidential informants are not accessible under OPRA, because they are exempted as part of criminal investigatory files.

10. Police techniques.

N.J.S.A. 47:1A-1.1 exempts from the definition of a "Government Record," the following:

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; and

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;

11. Mug shots.

Executive Order 69 (Whitman 1997) provides that fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local government agency are exempt from disclosure under OPRA.

12. Sex offender records.

In *Doe v. Poritz*, 142 N.J. 1 (1995), the Supreme Court examined the constitutionality of two statutes concerning sex offenders that were enacted as part of a group of laws generally referred to as Megan's

Law. The Registration Law, N.J.S.A. 2C:7-1 to :7-5, required that certain convicted sex offenders register with law enforcement authorities. The Community Notification Law, N.J.S.A. 2C:7-6 to :7-11, provided for notice to the community of the presence of such offenders.

In ruling that both laws were constitutional, the court held that the constitution did not prevent society from attempting to protect itself from convicted sex offenders, so long as the means of protection were reasonably designed for that purpose, and only for that purpose, and were not designed to punish. The court found, however, that appellant had a protectable liberty interest in his privacy and reputation, which triggered the right to due process. The court, therefore, concluded that a judicial hearing was constitutionally mandated prior to community notification under the Community Notification Law.

13. Emergency medical services records.

See explanation for N1, N4, N7 and N10 above.

HIPPA prevents disclosure of certain medical information. To the extent any information in these records is exempted from disclosure by HIPPA, it is likewise exempted from the definition of "government record" under OPRA.

O. Prison, parole and probation reports.

N.J.A.C. 10A:71-2.1 provides:

(a) The following information, files, documents, reports, records or other written material submitted to, prepared and maintained by or in the custody of the [Parole] Board, any Board member or employee pertaining to parole and parole supervision are deemed confidential:

1. Reports which are evaluative, diagnostic or prognostic in nature, furnished with a legitimate expectation of confidentiality and which, if revealed to the inmate/parolee or others, could be detrimental to the inmate, adversely affect the inmate's rehabilitation or the future delivery of rehabilitative services, jeopardize the physical safety of individuals who signed the reports or were parties to the decisions, conclusions, or statements contained therein;

2. Information, files, documents, reports, records or other written materials which, if disclosed, could have an adverse impact on the security or orderly operation of an institution;

3. Information, files, documents, reports, records or other written materials which, if disclosed, would infringe or jeopardize privacy rights of the inmate/parolee or others or endanger the life or physical safety of any person;

4. Disciplinary and investigative reports, including those from informants, which, if disclosed, would impede ongoing investigations, create a risk of reprisal, or interfere with the security or orderly operation of an institution;

5. Investigative reports or information compiled or intended for law enforcement purposes which, if disclosed, would impede ongoing investigations, interfere with law enforcement proceedings, constitute an unwarranted infringement of personal privacy, reveal the identity of a confidential source or confidential information furnished only by a confidential source, reveal investigative techniques and procedures, or endanger the life or physical safety of law enforcement personnel, confidential informants, victims or witnesses;

6. Information, files, documents, reports, records or other written materials which, if disclosed, would impede Board functions by discouraging persons from providing information to the Board.

7. Information, files, documents, reports, records or other written materials classified as confidential pursuant to the

Department's, Commission's or another agency's rules, statutory provisions or judicial decisions;

8. A transcript, if prepared, of any proceeding of the Board;

9. Such other information, files, documents, reports, records or other written materials as the Board may deem confidential to insure the integrity of the parole and parole supervision processes; and

10. All information, statements or testimony provided by a victim or nearest relative of a murder/manslaughter victim.

(b) All information, files, documents, reports, records or other written materials prepared and maintained by or in the custody of the Board, any Board member or employee pertaining to the administrative operations of the Board are deemed confidential.

(c) No information, files, documents, reports, records or other written material deemed confidential pertaining to inmates or parolees shall be reviewed by any person except a Board member or employee or individual or law enforcement agency authorized by the Board or by the Chairperson.

(d) Inmates or parolees shall be afforded disclosure of adverse material or information considered at a hearing, provided such material is not classified as confidential by the Board or the Department. If disclosure is withheld, the reason for nondisclosure shall be noted in the Board's files, and such material or information shall be identified as confidential.

(e) If any non-confidential file, document, report, record or other written material shall contain information deemed confidential pursuant to (a) above, the information deemed confidential shall be deleted prior to the file, document, report, record or other written material being reviewed by or released to any person or agency.

N.J.A.C. 10A:22-2.3 provides:

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 *et seq.*, any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 *et seq.*:

1. Informant documents and statements;

2. Special Investigations Division investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility;

3. A record, which consists of any alcohol, drug or other substance abuse information, testing, assessment, evaluation, report, summary, history, recommendation or treatment, including any assessment instruments;

4. Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

5. A report or record relating to an identified individual, which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement;

6. Comprehensive criminal history information (rap sheet);

7. Records of another department or agency allocated to that department in the possession of the Department of Cor-

rections when those records are made confidential by a rule of that department or agency allocated to that department adopted pursuant to N.J.S.A. 47:1A-1 *et seq.*, and Executive Order No. 9 (1963) or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure; or

8. The Department of Corrections Disaster/Terrorism Contingency Report.

(b) An inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.

P. Public utility records.

Almost all records on file with the Board of Public Utility Commissioners are public records, except for accident reports and safety inspection reports. See N.J.A.C. 14:3-6.5. *But see In re Provision of Telecommunications Relay Services*, 92 N.J.A.R.2d (BRC) 51 (1991).

Q. Real estate appraisals, negotiations.

These are "government records" as defined by OPRA. Any information contained in the records that would give an advantage to competitors or bidders if prematurely disclosed, is exempt from disclosure under OPRA.

1. Appraisals.

See explanation above.

2. Negotiations.

See explanation above.

3. Transactions.

See explanation above.

4. Deeds, liens, foreclosures, title history.

These records are "government records" as defined by OPRA.

5. Zoning records.

These records are "government records" as defined by OPRA.

R. School and university records.

N.J.S.A. 47:1A-1.1 provides that a government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential:

pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination;

records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;

valuable or rare collections of books and/or documents obtained

by gift, grant, bequest or devise conditioned upon limited public access;

information contained on individual admission applications; and information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

1. Athletic records.

See above.

2. Trustee records.

See above.

3. Student records.

See above.

4. Other.

See above.

S. Vital statistics.

1. Birth certificates.

N.J.A.C. 8:2-2.1 provides:

(a) The State Registrar or a local registrar may only issue a certified copy of a record of live birth to a person who satisfies the following requirements:

1. The person is able to identify the record;
2. The person provides, at a minimum, all of the information requested on the Vital Statistics and Registration application form; and
3. The person produces documentation verifying that he or she is:
 - i. The subject of the record of live birth;
 - ii. The subject's parent;
 - iii. The subject's legal guardian or legal representative;
 - iv. The subject's child, grandchild or sibling, if of legal age;
 - v. A State or Federal agency requesting the record for official purposes;
 - vi. A person requesting the record pursuant to a court order; or
 - vii. A person requesting the record under emergent circumstances, as determined on a case-by-case basis by the Commissioner.

N.J.A.C. 8:2-2.2 provides:

(a) The State Registrar or local registrar may issue certifications containing information obtained from the record of live birth to requestors not identified in N.J.A.C. 8:2B-3.1(a)3 so long as those requestors are first able to identify the record sought.

(b) All certifications issued under (a) above shall state that they are for informational purposes only and are not to be used for identification or legal purposes.

2. Marriage & divorce.

Marriage Certificates are "government records" as defined by OPRA. Divorce decrees are issued by a court and are subject to New Jersey Court Rule 1:38-1 et seq. governing access to court records.

3. Death certificates.

N.J.A.C. 8:2A-2.1 provides:

(a) The State Registrar or a local registrar may only issue a certified copy of a death record to a person who satisfies the following requirements:

1. The person is able to identify the record;
2. The person provides, at a minimum, all of the information requested on the Vital Statistics and Registration form entitled "Application for a Certification or a Certified Copy of a Vital Record," available from the Department upon request by calling (609) 292-4087 and at <http://nj.gov/health/vital/vital.shtml>; and
3. The person produces documentation verifying that he or she is:
 - i. The parent of the subject of the death record;
 - ii. The subject's legal guardian or legal representative;
 - iii. The subject's spouse or domestic partner;
 - iv. The subject's child, grandchild or sibling, if of legal age;
 - v. A State or Federal agency requesting the record for official purposes;
 - vi. A person requesting the record pursuant to a court order; or
 - vii. A person requesting the record under emergent circumstances, as determined on a case-by-case basis by the Commissioner.

(b) The certified copy of the death record shall include information deemed appropriate by the State Registrar; however, at a minimum, it shall include the name of the decedent, place of death (county, municipality), date of death, sex, date of birth, date of issuance and manner of death, providing this information is available.

(c) The certified copy of the death record may include other information; however, the last sickness and death particulars (cause of death and medical particulars) will only be included on the certified copy of the death record if the applicant satisfies the requirement in (a)3 above and requests that the last sickness and death particulars be included.

(d) Any of the relatives to the decedent listed in (a)3i through iv above, with the exception of the funeral director as legal representative, may consent to the release to a third party of a certified copy of the death record containing cause of death and medical particulars. Such consent must be provided in the form of an Authorization for Release of Cause of Death similar to that set forth in Appendix A, incorporated herein by reference.

(e) Any certified copy of a death record, with or without last sickness and death particulars, may be released without consent under the following conditions:

1. To qualified personnel for the purpose of conducting scientific research only under the following conditions:
 - i. An Institutional Review Board, constituted pursuant to Federal regulation 45 C.F.R. 46.101 et seq., shall review and approve the research protocol prior to release of the death record;
 - ii. Research personnel shall not identify the subject of the record, directly or indirectly, in any report of the research; and

- iii. Research personnel shall not disclose the identity of the subject of the record in any manner;
- 2. To qualified personnel for the purpose of conducting management audits, financial audits or program evaluation only under the following conditions:
 - i. Personnel shall not identify the subject of the record, directly or indirectly, in any report of an audit or evaluation;
 - ii. Personnel shall not disclose the identity of the subject of the record in any manner; and
 - iii. Identifying information shall not be released to the personnel unless it is vital to the audit or evaluation;
- 3. To the Department as required by State or Federal law; or
- 4. As permitted by the rules adopted by the Commissioner for the purposes of disease prevention and control.

N.J.A.C. 8:2A-2.2 provides:

(a)The State Registrar or local registrar may issue certifications containing information obtained from the death record to requestors not identified in N.J.A.C. 8:2A-2.1(a)3, so long as those requestors are first able to identify the record sought.

(b)All certifications issued under (a) above shall state that they are for informational purposes only and are not to be used for identification or legal purposes.

(c)The certification of the death record shall include, at a minimum, the name of the decedent, place of death (county, municipality), date of death, sex, date of birth, date of issuance and manner of death providing this information is available.

(d)The certification of the death record may include other information; however, the last sickness and death particulars (cause of death and medical particulars) will only be included on the certification of the death record if the applicant produces documentation verifying that he or she is:

- 1.The parent of the subject of the death record;
- 2.The subject's legal guardian or legal representative;
- 3.The subject's spouse or domestic partner;
- 4.The subject's child, grandchild or sibling, if of legal age;
- 5.A State or Federal agency requesting the record for official purposes;
- 6.A person requesting the record pursuant to a court order; or
- 7.A person requesting the record under emergent circumstances, as determined on a case-by-case basis by the Commissioner.

(e)Any of the relatives to the decedent listed in (d)1 through 4 above, with the exception of the funeral director as legal representative, may consent to the release to a third party of a certification of the death record containing cause of death and medical particulars. Such consent must be provided in the form of an Authorization for Release of Cause of Death similar to that set forth in the chapter Appendix, incorporated herein by reference.

(f)Any certification of a death record, with or without last sickness and death particulars, may be released without consent under the following conditions:

- 1.To qualified personnel for the purpose of conducting scientific research only under the following conditions:

- i.An Institutional Review Board, constituted pursuant to Federal regulation 45 C.F.R. 46.101 et seq., shall review and approve the research protocol prior to release of the death record;

- ii.Research personnel shall not identify the subject of the record, directly or indirectly, in any report of the research; and

- iii.Research personnel shall not disclose the identity of the subject of the record in any manner;

2.To qualified personnel for the purpose of conducting management audits, financial audits or program evaluation only under the following conditions:

- i.Personnel shall not identify the subject of the record, directly or indirectly, in any report of an audit or evaluation;

- ii.Personnel shall not disclose the identity of the subject of the record in any manner; and

- iii.Identifying information shall not be released to the personnel unless it is vital to the audit or evaluation;

3.To the Department as required by State or Federal law; or

4.As permitted by the rules adopted by the Commissioner for the purposes of disease prevention and control.

(g)The State Registrar or other custodian of vital records shall not permit physical inspection or access to the full death record, nor shall he or she disclose information, copy or issue the full death record, unless he or she is satisfied that the applicant is authorized to obtain a full copy of such record under N.J.A.C. 8:2A-2.1 or 2.2.

4. Infectious disease and health epidemics.

N.J.S.A. 47:1A-1 exempts from the definition of "Government Record":

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; and

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;

V. PROCEDURE FOR OBTAINING RECORDS

OPRA in N.J.S.A. 47:1A-5 contains detailed procedural guidelines for obtaining records.

A. How to start.

N.J.S.A. 47:1A-5(f) provides that the custodian of a public agency shall adopt a form for the use of any person. The form shall provide space for the name, address and phone number of the requester and a brief description of the record sought. The use of the particular form is not, however, required by OPRA.

The Appellate Division held in *Renma v. County of Union*, 407 N.J.Super. 230 (App. Div. 2009) that all OPRA requests must be in writing but that no custodian shall withhold records if the written request contains the requisite information prescribed by N.J.S.A. 47:1A-5(f) (name, address, phone number and a brief description of the records sought).

1. Who receives a request?

N.J.S.A. 47:1A-5(q) provides that the request shall be conveyed to the custodian. N.J.S.A. 47:1A-1.1 defines a custodian, in the case of a municipality to be the municipal clerk and in the case of other agen-

cies to be the person officially designated by the agency's governing body.

2. Does the law cover oral requests?

N.J.S.A. 47:1A-5(g) requires a request for access to a government record to be in writing. See explanation for Section V(A).

b. If an oral request is denied:

3. Contents of a written request.

N.J.S.A. 47:1A-5(f) requires the request contain a brief description of the record sought as well as the name, address, and phone number of the requester. See explanation for Section V(A).

a. Description of the records.

A written request should contain as detailed a description of the records sought as possible. It should be directed to the designated records custodian, in the case of a municipality the municipal clerk.

b. Need to address fee issues.

It is not essential that the fee issue be addressed in the initial request, since OPRA permits inspection as well as copying. N.J.S.A. 47:1A-5(a). It is often easier to simply inspect all relevant records and then request copies of the important ones after the inspection has been completed. N.J.S.A. 47:1A-5(b) establishes the maximum per page cost for copies of a government record in the absence of another law or regulation fixing the fee.

c. Plea for quick response.

N.J.S.A. 47:1A-5(i) directs that custodian shall grant or deny a request for access as soon as possible but not later than seven business days unless the record is archived or in storage or the request would substantially disrupt agency operations. N.J.S.A. 47:1A-5(e) provides that immediate access should ordinarily be granted to budgets, bills, vouchers, contracts and public employee salary and overtime information.

d. Can the request be for future records?

The statute is silent on this issue. However, the definition of government record, which speaks to a record maintained or kept on file and the statutory time limit to grant or deny a request would seem to result in a conclusion that the request cannot be for future records.

B. How long to wait.

1. Statutory, regulatory or court-set time limits for agency response.

See c. above

2. Informal telephone inquiry as to status.

Usually the only way to spur action on a request is to follow-up by telephone within a day or two after the request is received. Be persistent and continue up the chain of command within the agency until you get a decision.

3. Is delay recognized as a denial for appeal purposes?

N.J.S.A. 47:1A-5(i) provides that the failure of a custodian to respond within seven (7) business dates constitutes a denial.

4. Any other recourse to encourage a response.

Often a phone call to an elected or politically appointed public official can be helpful, since these individuals usually are more responsive to the media than bureaucrats. Also a call from the newspaper's attorney to the attorney representing the public agency can be effective.

C. Administrative appeal.

Under OPRA, the remedy for denial of a request for public records

is by a prerogative writs action in the Law Division of the Superior Court. N.J.S.A. 47:1A-6. The statute also provides an alternate mechanism, at the sole option of the requester, of filing a complaint with the Government Records Council. Claims under the common law right to know are only cognizable in Superior Court.

1. Time limit.

The time limit for filing a Complaint in lieu of Prerogative Writs to obtain records from a public agency or official is 45 days from the date of denial. However, another request for the same records can be made at any time by another party, thereby triggering a new 45-day time limit for filing suit. See *Shuttleworth v. City of Camden, supra*. It is not clear whether a complaint to the Government Records Council will also be subject to the 45-day limit although it is likely that will be the case.

2. To whom is an appeal directed?

Under OPRA, the remedy for denial of a request for public records is by a prerogative writs action in the Law Division of the Superior Court. N.J.S.A. 47:1A-6. The statute also provides an alternate mechanism, at the sole option of the requester, of filing a complaint with the Government Records Council. Claims under the common law right to know are only cognizable in Superior Court.

4. Contents of appeal letter.

An appeal should include a verified complaint setting forth the appellant's identity, the records relevant to the appeal, whether the appellant received a response to his or her records request, whether any redactions were made and why the requestor deems the response to be unsatisfactory. The appeal should also set forth any conversations the appellant had with the custodian of the records about the request. An appellant should also set forth the facts and legal arguments supporting his or her case.

6. Subsequent remedies.

An appellant can file an appeal of the GRC's decision or the Superior Court's decision to the Appellate Division.

D. Court action.

1. Who may sue?

Any "citizen" of New Jersey who has been denied the right to inspect, copy, or obtain a copy of public record may bring an action to enforce the rights granted under OPRA or the common law. See N.J.S.A. 47:1A-4; *Irval Realty Inc. v. Board of Public Utility Comm'rs, supra*. "Citizen" includes newspapers published or circulated in New Jersey and any private commercial enterprise, even if motivated solely by "private pecuniary gain." *Techniscan Corp. v. Passaic Valley Water Comm'n, supra*.

2. Priority.

Prerogative writ actions in the Law Division of Superior Court are generally given priority.

3. Pro se.

It is usually inadvisable to attempt a *pro se* court action to obtain records, due to both the substantive and procedural complexities involved.

4. Issues the court will address:

In a court action, the court will consider all issues raised by the pleadings, including denial of access to the records, the reasonableness of any fees, delays in obtaining records. See *Techniscan Corp. v. Passaic Valley Water Comm'n, supra*. In an action before the Government Records Council, the council may only consider claims arising under OPRA.

5. Pleading format.

A suit to obtain access to records is styled with the party seeking access as the plaintiff and the public agency and/or the record custodian as the defendant. It is captioned “Complaint in lieu of Prerogative Writs.” See N.J.S.A. 47:1A-4; Rule 4:69. A complaint to the Government Records Council merely must be a writing alleging that a custodian has improperly denied access. N.J.S.A. 47:1A-7(d).

6. Time limit for filing suit.

The time limit for filing a Complaint in lieu of Prerogative Writs to obtain records from a public agency or official is 45 days from the date of denial. However, another request for the same records can be made at any time by another party, thereby triggering a new 45-day time limit for filing suit. See *Shuttleworth v. City of Camden*, *supra*. It is not clear whether a complaint to the Government Records Council will also be subject to the 45-day limit although it is likely that will be the case.

7. What court.

The Complaint in lieu of Prerogative Writs is filed in the Superior Court, Law Division, in the county wherein the public agency is located. See N.J.S.A. 47:1A-4.

8. Judicial remedies available.

The remedies available in a Prerogative Writs action include an order directing that access to all records be permitted, that access to only portions of redacted records be permitted, or that no access be permitted. The court can also rule on the reasonableness of fees. See *Techniscan Corp. v. Passaic Valley Water Comm’n*, *supra*; *Shuttleworth v. City of Camden*, *supra*.

9. Litigation expenses.

N.J.S.A. 47:1A-6 provides that a requester who prevails in any proceeding shall be enabled to reasonable attorney fees.

a. Attorney fees.

N.J.S.A. 47:1A-6 provides, in relevant part, “if it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.”

10. Fines.

N.J.S.A. 47:1A-11 provides that a public official, officer or custodian who knowingly and willfully violates the act and is found to have unreasonably denied access under the totality of the circumstances is subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation occurring within 10 years of the initial violation and \$5,000 for a third violation within 10 years of an initial violation.

11. Other penalties.

There is no provision for any other penalty against the public agency or official denying access to public records.

12. Settlement, pros and cons.

Settlement or compromise of a records request is often desirable, particularly where an adverse result could bar future access. Settlement often takes the form of partial satisfaction of the request or redacted copies of the records. Any settlement should of course, address the issue of counsel fees as part of the settlement.

Courts apply the catalyst theory to settlements involving OPRA denials in order to determine which party is the prevailing party. The catalyst theory consists of a two part test: (1) there must be a factual causal nexus between the plaintiff’s litigation and the relief ultimately achieved; in other words, the plaintiff’s efforts must be a necessary and important factor in obtaining the relief, and (2) it must be shown that the relief ultimately secured by plaintiffs had a basis in law. A plaintiff is considered a prevailing party when actual relief on the merits of the claim materially alters the relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff. The form of the judgment is not entitled to conclusive weight; rather, courts must look to whether a plaintiff’s lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. A settlement that confers the relief sought may still entitle plaintiff to attorney’s fees in fee-shifting matters. See, *Mason v. City of Hoboken*, 196 N.J. 51 (2008).

E. Appealing initial court decisions.

1. Appeal routes.

Appeal from an adverse decision in a Prerogative Writs action is to the Appellate Division of the Superior Court. Likewise, appeals from decisions of the Government Records Council are appealable to the Appellate Division. Further appeal is to the New Jersey Supreme Court.

2. Time limits for filing appeals.

The time limit for appeal from a Prerogative Writs action is 45 days from the entry of the final judgment or order. Rule 2:4-1. A petition for certification seeking review by the Supreme Court of a final judgment of the Appellate Division must be filed within 20 days of entry of final judgment. Rule 2:13-3.

3. Contact of interested amici.

Amicus briefs on important issues of access and other free press/fair trial issues often are filed by the New Jersey Press Association and/or some of the major newspapers circulated in New Jersey, such as *Newark Star Ledger*, *The Trenton Times*, *The Philadelphia Inquirer*, *The New York Times*, and the Gannett group newspapers. In addition, the Reporters Committee for Freedom of the Press frequently files *amicus* briefs when open records issues are before the New Jersey Supreme Court.

F. Addressing government suits against disclosure.

There is no apparent case law on this topic.

Open Meetings

I. STATUTE -- BASIC APPLICATION.

A. Who may attend?

Any member of the public has the right to be present at all meetings of public bodies. N.J.S.A. 10:4-7.

B. What governments are subject to the law?

The provisions of the Sunshine Law apply to all levels of government in New Jersey — state, county and local or municipal. N.J.S.A. 10:4-7.

C. What bodies are covered by the law?

1. Executive branch agencies.

a. What officials are covered?

The Sunshine Law applies only to a “public body” — “a commission, authority, board, council, committee or any group of two or more persons organized under the laws of this State and collectively empowered as a voting body to perform a public governmental function . . . or collectively authorized to spend public funds.” N.J.S.A. 10:4-8a. Therefore the activities of an executive such as the Governor or a mayor are not covered by the law.

b. Are certain executive functions covered?

When an executive acts as a part of a public body, such as a mayor serving on a city council, the executive’s functions in this respect are subject to the Sunshine Law. N.J.S.A. 10:4-8.

c. Are only certain agencies subject to the act?

All other executive agencies which are organized under the laws of New Jersey and “collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person, or collectively authorized to spend public funds,” are subject to all provisions of the Sunshine Law. Specifically excluded from coverage are: (i) the judicial branch of government; (ii) any grand or petit jury; (iii) any parole board or any agency acting in a parole capacity; (iv) the State Commission of Investigation; (v) the Appointment Commission; and (vi) any political party. N.J.S.A. 10:4-8a (emphasis added).

2. Legislative bodies.

The State Legislature and all county and local legislative bodies are subject to all provisions of the Sunshine Law. N.J.S.A. 10:4-8a.

3. Courts.

The judicial branch of government is specifically excluded from coverage by the Sunshine Law. However, New Jersey Court Rules require that all trials, hearings or motions and other applications, pre-trial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court and on the record. R.1:2-1 and 2. Exceptions to these requirements include: (i) grand jury proceedings, R.3:6-7; (ii) hearing on request of a public official after grand jury censure, R.3:6-9(c); (iii) prosecutor’s application for a protective order, R.3:13-3(d)(2); (iv) proceedings before a medical malpractice panel, R.4:21-8; (v) involuntary civil commitment hearings, R.4:74-7(e); (vi) hearings in certain matters in municipal court, R.7:4-4(c); (viii) interviews of jurors after return of verdict, *Scott v. Salem Hospital*, 116 N.J. Super. 29, 280 A.2d 843 (App. Div. 1971); (ix) initial determination on a claim of privilege, *State v. Boiardo*, 83 N.J. 350, 416 A.2d 973 (1980); (x) hearings in adoption matters, N.J.S.A. 9:3-47 and 48; (xi) hearings in parentage disputes, N.J.S.A. 9:17-41; (xii) threshold inquiries into prior sexual conduct of victim of sex offense, N.J.S.A. 2C:14-7(a); and (xiii) inspection of documents of one claiming newsperson’s privilege, N.J.S.A.

2A:84A-21.4.

4. Nongovernmental bodies receiving public funds or benefits.

The Sunshine Law only applies to a commission, authority, board, council, committee or group of two or more persons “organized under the laws of” New Jersey. Unless there is a statute, ordinance or regulation creating the organization, it is not subject to the provisions of the Sunshine Law. N.J.S.A. 10:4-8a.

5. Nongovernmental groups whose members include governmental officials.

The Times of Trenton Publishing Company v. Lafayette Yard Community Development Corporation, 183 N.J. 519 (2005). Lafayette Yards was a private, non-profit corporation established solely to assist the City of Trenton, the Trenton Parking Authority and the State of New Jersey to provide for the redevelopment of a 3.1 acre site in Trenton through the construction of a hotel, conference center and parking facility. The corporation operated under certain constraints consistent with the Internal Revenue Code so that it could issue tax exempt bonds because its debt would then be deemed by the IRS to have been issued on behalf of the State or a political subdivision thereof. Among the constraints was a provision that title to the corporation’s property revert to the City of Trenton when the Corporation’s indebtedness was retired. Similarly, the City appointed or approved of the appointment of at least 80 percent of the corporation’s governing board. The Times of Trenton sought to attend meetings of the board under the Sunshine Law and sought access to the board minutes under OPRA. The New Jersey Supreme Court determined that the Corporation was subject to both statutes because it is a public body performing a governmental function within the sunshine law and was an instrumentality or agency created by a political subdivision under OPRA. See also *Sussex Commons Associates, LLC v. Rutgers*, 416 N.J. 537 (App. Div. 2010).

6. Multi-state or regional bodies.

There is no case law applying the Sunshine Law to multistate or regional bodies.

7. Advisory boards and commissions, quasi-governmental entities.

Governmental boards, commissions, councils and committees which are purely advisory in nature and which are not collectively empowered to perform governmental functions or spend public funds are exempt from the provisions of the Sunshine Law. N.J.S.A. 10:4-8a; *Township Committee v. Board of Chosen Freeholders*, 213 N.J. Super. 179, 516 A.2d 1140 (Law Div. 1985).

8. Other bodies to which governmental or public functions are delegated.

Any commission, authority, board, council, committee or group of two or more persons which is created by statute, ordinance or regulation and collectively empowered as a voting body to perform a government function or spend public funds is subject to all the provisions of the Sunshine Law, N.J.S.A. 10:4-8(a). See *Council of New Jersey State College Locals v. New Jersey State College Governing Boards Ass’n*, 266 N.J. Super. 556, 545 A.2d 204 (App. Div. 1988).

9. Appointed as well as elected bodies.

The requirements of the Sunshine Law apply to every public body, whether elected or appointed, which performs a public governmental function or spends public funds.

D. What constitutes a meeting subject to the law.

In order to constitute a meeting subject to the provisions of the Sunshine Law, there must be a “gathering,” either in person or by means of communications equipment, which is open to all members of the public body and which is held with the intent to discuss or act on specific public business. N.J.S.A. 10:4-8b. Typical partisan caucus

meetings and chance encounters of members of public bodies are not intended to be covered by the Sunshine Law. Introductory Statement, Assembly No. 1030, L.1975, c.231. A specific exemption is also provided for public bodies which meet as part of a convention open to three or more similar public bodies. N.J.S.A. 10:4-8b.

1. Number that must be present.

A meeting attended by less than a quorum or majority of the members of the public body is not subject to the provisions of the Sunshine Law, unless this group has effective authority to act on public business or prevent public business from coming before the public body. N.J.S.A. 10:4-8b and c; Atty. Gen. Formal Opinion 1976, No. 19. The Sunshine Law specifically prohibits any person or public body from failing to invite a portion of its members to a meeting “for the purpose of circumventing” any provisions of the law. N.J.S.A. 10:4-11. Thus, a public body cannot hold two or more meetings with small groups of its members to discuss an issue in order to avoid holding a public meeting of all members on the issue.

a. Must a minimum number be present to constitute a “meeting”?

Yes, as noted above, a quorum of the members of the public body must be present in order to constitute a meeting.

b. What effect does absence of a quorum have?

The Act will not be triggered unless the failure to have a quorum was the result of a failure to invite for the purpose of circumventing the Act.

2. Nature of business subject to the law.

Any meeting of a public body held with the intent to discuss or act on any matter related either directly or indirectly to the performance of the public body’s function or the conduct of its business is covered by the Sunshine Law. N.J.S.A. 10:4-8b. Since the law applies to both discussions and actions by a public body, information-gathering and fact-finding sessions and all deliberations toward a decision must be open to the public and subject to the other requirements of the Sunshine Law. See *Allan-Deane Corp. v. Bedminster Twp.*, 153 N.J. Super. 114, 379 A.2d 265 (App. Div. 1977); *South Harrison Township Committee v. Board of Chosen Freeholders*, 210 N.J. Super. 370, 510 A.2d 42 (App. Div. 1986).

a. “Information gathering” and “fact-finding” sessions.

See number 2 above.

b. Deliberations toward decisions.

See number 2 above.

3. Electronic meetings.

Any “gathering” by means of electronic equipment which is open to all members of the public body is subject to the provisions of the Sunshine Law if conducted with the intent to discuss public business.

a. Conference calls and video/Internet conferencing.

See (a).

b. E-mail.

See (a).

c. Text messages.

See (a).

d. Instant messaging.

See (a).

e. Social media and online discussion boards.

See (a).

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

Those meetings listed in the schedule of regular meetings adopted by the public body at its annual reorganization meeting or, if no reorganization meeting is held, then by January 10 of each year.

b. Notice.

(1). Time limit for giving notice.

A schedule of regular public meetings must be adopted by each public body within seven days following its annual reorganization meeting or, if no reorganization meeting is held, then by January 10 of each year. If the schedule of regular meetings is thereafter revised, notice of the revisions must be given within seven days of adoption. N.J.S.A. 10:4-18.

(2). To whom notice is given.

The annual schedule of regular meetings must be mailed to at least two newspapers circulated within the area of jurisdiction of the public body, including one newspaper which is to be designated as the “official newspaper” of the public body. (Note that the schedule need not be published by the newspapers; it must only be mailed to them.) N.J.S.A. 10:4-18; 10:4-8d; see *Township of Bernards v. State Dept. of Community Affairs*, 233 N.J. Super. 1, 558 A.2d 1 (App. Div.), *certif. den.* 118 N.J. 194, 195, 570 A.2d 959 (1989). The schedule must also be filed with: (i) the clerk of the municipality, for municipal public bodies; or (ii) the clerk of the county, for county-wide public bodies; or (iii) the Secretary of State, for state-wide public bodies. N.J.S.A. 10:4-8d. Additionally, the schedule must be mailed to any person who has requested it in writing and prepaid the fee established by the public body for such service. Requests for the schedule of regular meetings and notice of special meetings must be renewed annually. N.J.S.A. 10:4-19.

(3). Where posted.

The annual schedule of regular meetings and any revisions must be prominently posted in at least one public place reserved for such announcements. N.J.S.A. 10:4-8. The place of posting is usually adopted by resolution of the public body, and generally is a bulletin board located in or near the public building where the meetings are held.

(4). Public agenda items required.

The annual schedule of regular meetings need not include the proposed agenda for each meeting. See N.J.S.A. 10:4-18. Consequently, there is no requirement that a public body give notice of the proposed agenda for each regularly scheduled meeting. See *Crifasi v. Governing Body of Oakland*, 156 N.J. Super. 182, 383 A.2d 736 (App. Div. 1978). However, most public bodies do post the agenda for each regularly scheduled meeting shortly after it is prepared. The agenda is usually posted in the same location as the annual schedule of regular meetings. When the agenda of a regular meeting is posted, the public body is not limited to discussion or action on that agenda; it may take up items not on the agenda unless the omission was intentional and was designed to deceive the public. See *Crifasi v. Governing Body of Oakland*, *supra*.

(5). Other information required in notice.

The annual schedule of regular meetings must contain the date and time of each meeting and its location “to the extent known.” N.J.S.A. 10:4-18.

(6). Penalties and remedies for failure to give adequate notice.

Where adequate notice of a regular public meeting has not been given, any person may: (i) seek injunctive relief in Superior Court to prevent the meeting from being held, N.J.S.A. 10:4-16; or (ii) bring an action in Superior Court within 45 days after the meeting to void any action taken, N.J.S.A. 10:4-15. Additionally, on complaint of the At-

torney General or the County Prosecutor, any person who knowingly violates any provision of the Sunshine Law shall be fined \$100 for the first offense and \$500 for any subsequent offense. N.J.S.A. 10:4-17.

c. Minutes.

(1). Information required.

A public body is required to keep “reasonably comprehensible” (sic) minutes of all meetings showing the time and place, the members present, the subject considered, the actions taken, and the vote of each member. N.J.S.A. 10:4-14. The minutes need not reveal why the action was or was not taken, only what took place and what final action was taken. *Liebeskind v. Mayor and Council of Bayonne*, 265 N.J. Super. 389, 627 A.2d 677 (App. Div. 1993). The minutes must also contain a statement specifying the time, place and manner in which public notice of the meetings was given. N.J.S.A. 10:4-10a. *See AQN Ass’n v. Florence Twp.*, 248 N.J. Super. 597, 591 A.2d 995 (App. Div. 1991).

(2). Are minutes public record?

The minutes of all public meetings, including portions of any meeting from which the public was properly excluded, are public records under the Open Public Records Act. *See South Jersey Publishing Co. v. New Jersey Expressway Authority*, 124 N.J. 461, 591 A.2d 921 (1991). Promptly available has been held to mean two weeks or before the next meeting of the public body, whichever is earlier. *See Matawan Reg. Teachers Ass’n v. Matawan-Aberdeen Reg. Bd. of Educ.*, 212 N.J. Super. 322, 514 A.2d 1361 (Law Div. 1986).

2. Special or emergency meetings.

a. Definition.

A special meeting is any meeting not listed on the annual schedule of regular meetings for which written advance notice of at least 48 hours can be given. N.J.S.A. 10:4-8d; 10:4-9b(4). An emergency meeting is one that, upon the affirmative vote of three-quarters of the members present, is determined to be necessary in order to deal with a matter of such urgency and importance that delay for the purpose of providing adequate notice would be likely to result in substantial harm to the public interest. N.J.S.A. 10:4-9b(1).

b. Notice requirements.

(1). Time limit for giving notice.

At least 48 hours advance notice must be given for any special meeting. N.J.S.A. 10:4-8d. Notice of an emergency meeting must be provided “as soon as possible following the calling of such meeting.” N.J.S.A. 10:4-9b(3).

(2). To whom notice is given.

Notice of a special meeting must be “mailed, telephoned, telegraphed or hand delivered” to two newspapers at least 48 hours prior to the start of the meeting. N.J.S.A. 10:4-8d. Note that the newspaper need not publish the notice. However, one of the newspapers to which notice is sent must have a publication schedule which would permit publication prior to the meeting. *See Worts v. Mayor and Council of Upper Township*, 176 N.J. Super. 78, 442 A.2d 112 (Ch. Div. 1980). Notice of a special meeting must also be filed with the clerk who received the annual schedule, N.J.S.A. 10:4-8d, and mailed at least 48 hours in advance to any person who has filed a request for the annual schedule. N.J.S.A. 10:4-19. Notice of an emergency meeting must be telephoned, telegraphed or delivered to the two newspapers which received the annual schedule. N.J.S.A. 10:4-9b(3).

(3). Where posted.

Notices of special and emergency meetings must be posted in the same location as the annual schedule. N.J.S.A. 10:4-8d and 10:4-9b(3).

(4). Public agenda items required.

The notices of both special and emergency meetings must include the agenda “to the extent known.” N.J.S.A. 10:4-8d and 10:4-9a. Note

that an emergency meeting is limited to “discussion of and acting with respect to such matters of urgency and importance” as gave rise to the need to call the emergency meeting. N.J.S.A. 10:4-9b(2).

(5). Other information required in notice.

Notices of special and emergency meetings must also include the time, date and location of the meeting and whether formal action may or may not be taken. N.J.S.A. 10:4-8d and 10:4-9a.

(6). Penalties and remedies for failure to give adequate notice.

The penalties and remedies for failure to give adequate notice of a special meeting are the same as those for a regular meeting, i.e., injunctive relief, voiding of action taken, and fines. N.J.S.A. 10:4-15, 16 and 17. Where no valid emergency exists, or where there is not even an attempt to comply with the notice requirements for an emergency meeting, the same penalties may be imposed. *See Dunn v. Mayor and Council and Clerk of Laurel Springs*, 163 N.J. Super. 32, 394 A.2d 145 (App. Div. 1978).

c. Minutes.

The information required in the minutes of a special or emergency meeting is the same as that for regular meetings, and the minutes must be “promptly” available to the public. N.J.S.A. 10:4-14. In addition, the minutes of an emergency meeting must state the nature of the urgency and importance and the substantial harm to the public interest likely to result from a delay in holding the meeting. N.J.S.A. 10:4-10b.

(2). Are minutes a public record?

Yes, pursuant to the Open Public Records Act.

3. Closed meetings or executive sessions.

a. Definition.

A public body in New Jersey is permitted to go into closed session and exclude the public from attendance only when “discussing” nine specific subject matter areas. *See* N.J.S.A. 10:4-12b. These will be treated in detail in Section II below. Note that a closed session is limited to discussions; one case has held that a public body can debate an issue in closed session, but cannot act on it. *Houman v. Pompton Lakes*, 155 N.J. Super. 129, 382 A.2d 413 (Law Div. 1977).

b. Notice requirements.

(1). Time limit for giving notice.

In order to go into closed session, a public body must adopt a resolution at a public meeting for which public notice pursuant to N.J.S.A. 10:4-18 has been given. N.J.S.A. 10:4-13.

(2). To whom notice is given.

Once the resolution to go into closed session is adopted at a public meeting, no further notice of the closed session is required. N.J.S.A. 10:4-13; *see* Atty. Gen. Formal Op. 1976, No. 29. However, where the closed session is to discuss termination or disciplining of personnel, actual notice of the session must be given to the affected employees so they can decide if they desire a public meeting. *See Rice v. Union County Regional Board of Education*, 155 N.J. Super. 64, 382 A.2d 386 (App. Div. 1977).

(3). Where posted.

Notice for the public meeting at which the resolution to enter into executive session has been adopted must be posted pursuant to N.J.S.A. 10:4-8.

(4). Public agenda items required.

The resolution to go into closed session must (i) state the “general nature” of the subject matter to be discussed in the closed session, and (ii) state “as precisely as possible” the time when and the circum-

stances under which the discussion conducted in closed session can be disclosed to the public. N.J.S.A. 10:4-13. In an unpublished decision, *Paff v. Monroe Township Board of Education*, 2007 WL 191984 (Law Div.), the Court indicated that a Resolution restating the provisions of the law allowing a closed session is not in compliance with the statute.

(5). Other information required in notice.

None.

(6). Penalties and remedies for failure to give adequate notice.

The penalties and remedies for improperly resolving to go into closed session are the same as those for other violations, i.e., injunctive relief, voiding of the action taken, and fines. See N.J.S.A. 10:4-15, 16 and 17.

c. Minutes.

(1). Information required.

A public body is required to keep minutes of a closed session to the same extent as a public session. N.J.S.A. 10:4-14.

(2). Are minutes a public record?

The minutes, including tape recordings, of a closed session may be public records under the Open Public Record Act or the common law. N.J.S.A. 10:4-14. See *Payton v. N.J. Turnpike Authority*, 148 N.J. 524, 691 A.2d 321 (1997); *South Jersey Pub. Co. v. N.J. Expressway Authority*, 124 N.J. 461, 591 A.2d 921 (1991); *Atlantic City Convention Authority v. South Jersey Pub. Co.*, 135 N.J. 53, 637 A.2d 1261 (1994).

d. Requirement to meet in public before closing meeting.

To go into a closed session, a public body must first adopt a resolution at a public meeting (regular, special or emergency) for which public notice has been given in accordance with the Sunshine Law.

e. Requirement to state statutory authority for closing meetings before closure.

A resolution to go into closed session which merely “parrots” the statutory language is insufficient. The resolution should contain as much information as is consistent with full public knowledge without doing harm to the public interest that supports the closure. *Council of New Jersey State College Locals v. Trenton State*, 284 N.J. Super. 108, 663 A.2d 664 (Law Div. 1995). See *Houman v. Mayor of Pompton Lakes*, 155 N.J. Super. 129, 149-50, 382 A.2d 413 (Law Div. 1977) and *McGovern v. Rutgers*, 2011 N.J. Super. Lexis 32 (App. Div., 2011).

f. Tape recording requirements.

There is no requirement that a closed session be tape recorded; minutes of a closed session must be kept “to the same extent as a public session.” N.J.S.A. 10:4-14.

F. Recording/broadcast of meetings.

While the Sunshine Law is silent on the issue of sound and photographic recording of public meetings, the courts have held that such a right is inherent in the law. Both sound and photographic recordings are therefore permitted subject to reasonable regulations, which generally should follow the New Jersey Supreme Court Guidelines for still and television camera and audio coverage of proceedings in the courts of New Jersey. See *Maurice River Board of Education v. Maurice River Teachers Ass’n*, 187 N.J. Super. 566, 455 A.2d 563 (Law Div. 1982), *aff’d* 193 N.J. Super. 488, 475 A.2d 59 (App. Div. 1984). The Supreme Court Guidelines permit (i) no more than two videotape cameras; (ii) no more than two still photographers; (iii) no more than one audio system for radio broadcasts; and (iv) no artificial lighting. The guidelines also require the media to obtain permission in advance and to position themselves in the areas designated. Movement of personnel and equipment is allowed only before or after the meeting or

during recesses.

In a recently decided case, *Tarus v. Borough of Pine Hill*, 189 N.J. 497 (2007) the Supreme Court held there was a common law right to videotape a municipal council meeting subject to reasonable restrictions.

1. Sound recordings allowed.

See above.

2. Photographic recordings allowed.

See above.

G. Are there sanctions for noncompliance?

For a first offense of the open meetings law, a violator is fined \$100. For any subsequent offenses the violator can be fined between \$100 and \$500. N.J.S.A. 10:4-17. By objecting to a closed meeting and stating the reasons for believing the meeting should be open, an official may be exempt from fines. N.J.S.A. 10:4-17. A court may void any action taken at an improperly closed meeting. N.J.S.A. 10:4-15(a).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

There are nine specific subject matter exceptions to the requirement that all meetings be open to the public. N.J.S.A. 10:4-12b(1) to (9). These exceptions are to be strictly construed in order that the broad public policy underlying the Sunshine Law is realized. *Woodcock v. Calabrese*, 148 N.J. Super. 526, 372 A.2d 1178 (Dist. Ct. 1977). See N.J.S.A. 10:4-7.

b. Mandatory or discretionary closure.

A closed session to discuss any of the excepted subjects is discretionary. Closure is permitted only after adoption of a resolution setting forth (i) the “general nature” of the subject to be discussed; and (ii) the time when and the circumstances under which the discussion conducted in closed session can be disclosed to the public. N.J.S.A. 10:4-12b and 10:4-13.

2. Description of each exemption.

See N.J.S.A. 10:4-12b. The public may be excluded from discussion of:

(i) any matter which, by express provision of federal or state statute or rule of court is rendered confidential;

(ii) any matter in which the release of information would impair the right to receive federal funds;

(iii) any matter the disclosure of which would constitute an unwarranted invasion of privacy, including records, reports, recommendations, data, or other personal material pertaining to a specific individual admitted to or served by a training, educational, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance, or similar program or institution operated by a public body, unless the individual concerned shall request in writing that the same be disclosed publicly;

(iv) any collective bargaining agreement, or the terms and conditions proposed for inclusion in a collective bargaining agreement, including the negotiation with employees or representatives of employees;

(v) any matter involving the purchase, lease or acquisition of real property with public funds, or the setting of banking rates or the investment of public funds, where the discussion could adversely affect the public interest;

(vi) any tactics or techniques to be used in protecting the safety and property of the public, where disclosure could impair such protection and any investigations of possible violations of the law;

(vii) any pending or anticipated litigation or contract negotiation in which the public body is or may be a party, or any matters falling within the attorney-client privilege;

(viii) any matter involving employment, appointment, termination of employment, evaluation of performance of, promotion or disciplining of any current or prospective public employee or appointee, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such discussion take place at a public meeting. Note that this exception does not apply where the public body is appointing a person to fill the unexpired term of an elected official. See *Gannett v. Board of Education of Manville*, 201 N.J. Super. 65,492 A.2d 703 (Law Div. 1984);

(ix) any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility. Note that this last exception applies only to the deliberations of a public body following a public hearing. However, where a state statute requires that the entire hearing be held in private, it takes precedence over this exception. See *Cringle v. Maywood Board of Education* 164 N.J. Super. 595,397 A.2d 400 (Law Div. 1979). It is also important to note that the closed session is limited to discussion; any action by the public body must be taken in a duly noticed public meeting. See N.J.S.A. 10:4-12b and *Houman v. Pompton Lakes*, 155 N.J. Super. 129,382 A.2d 413 (Law Div. 1977).

B. Any other statutory requirements for closed or open meetings.

None.

C. Court mandated opening, closing.

None.

III. MEETING CATEGORIES -- OPEN OR CLOSED.

A. Adjudications by administrative bodies.

Pursuant to the New Jersey Administrative Practice and Procedure Act, all contested matters before a state administrative agency are referred to be referred to an administrative law judge for a hearing and a recommendation, report and decision. N.J.S.A. 52:14B-10(c). All evidentiary hearings, proceedings on motions and other applications before the administrative law judge are public, unless otherwise provided by statute, rule or regulation, or on order of the judge for good cause. N.J.A.C. 1:1-14.1. The principal statutory and regulatory exceptions to the public hearing requirement are in special education cases and in cases involving the Department of Human Services. Within 45 days of the hearing, the judge must issue a written report and decision, including recommended findings of fact and conclusions of law, to the administrative agency. N.J.S.A. 52: 14B-10(c). The head of the administrative agency or, in the case of a collective public body such as a commission, authority or board, the entire public body, then must issue a written decision adopting, rejecting or modifying the judge's decision.

1. Deliberations closed, but not fact-finding.

The deliberations of a public body considering a judge's recommended decision on imposition of a civil penalty or suspension or loss of a license or permit may be held in closed session. N.J.S.A. 10:4-12b(9). However, the final written decision of the head of the agency or the public body is a matter of public record. See N.J.S.A. 52:14B-10(d).

B. Budget sessions.

Where a budget session is attended by an effective majority of the public body, it is required to be open to the public. Where a budget session is attended by less than a quorum or effective majority, it is not required to be open to the public unless the group or committee

has effective authority to act on portions of the budget or to prevent certain budget items from coming before the public body. See N.J.S.A. 10:4-8b and c; Atty. Gen. Formal Op. 1976, No. 19.

C. Business and industry relations.

A meeting of an effective majority of a public body to discuss business and industry relations, including plans for attracting business, is required to be open to the public unless the discussions involve (i) purchase or lease or acquisition of real property with public funds, or (ii) contract negotiations, or (iii) where the release of information would impair the right to receive federal funds. See N.J.S.A. 10:4-12b(2),(5) and (7).

D. Federal programs.

A meeting of an effective majority of public body to discuss applications for federal grants or other aspects of a federal program is open to the public unless the discussions involve (i) contract negotiations or (ii) anticipated litigation, or (iii) where the release of information would impair the right to receive federal funds. See N.J.S.A. 10:4-12b(2) and (7).

E. Financial data of public bodies.

Access to financial records of a public body is governed by the Right to Know Law and the common law.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

Access to these records is governed by the Right to Know Law and the common law. A meeting of an effective majority of a public body to discuss business and industry relations, including plans for attracting business, is required to be open to the public unless the discussions involve (i) purchase or lease or acquisition of real property with public funds, or (ii) contract negotiations, or (iii) where the release of information would impair the right to receive federal funds. See N.J.S.A. 10:4-12b(2),(5) and (7).

G. Gifts, trusts and honorary degrees.

Discussions by a public body regarding these subjects may fall within the "invasion of individual privacy" exception and arguably can be held in closed session. See N.J.S.A. 10:4-12b(3).

H. Grand jury testimony by public employees.

The judicial branch of government is specifically excluded from coverage by the Sunshine Law, N.J.S.A. 10:4-8a, and Grand Jury proceedings are confidential. N.J. Court Rule 3:6-7.

I. Licensing examinations.

Access to these records is governed by Open Public Records Act and the common law and generally all examinations conducted by state and local government agencies are not open to the public. Hughes Executive Order No. 9 (1963).

J. Litigation; pending litigation or other attorney-client privileges.

Discussions of litigation in which a public body is or anticipates being a party may be held in closed session. Also, any matter falling within the attorney-client privilege "to the extent that confidentiality is required in order for the attorney to exercise his [her] ethical duties as a lawyer" may be discussed in closed session. N.J.S.A. 10:4-12b(7). To invoke this exception, the public body must actually be discussing its strategy, the position it will take, the strengths and weaknesses of those positions, and possible settlement. This exception cannot be used as a pretext to discuss aspects of the matter not directly related to the litigation itself. See Atty. Gen. Formal Op. 1976, No. 30; *Houman v. Pompton Lakes*, 155 N.J. Super. 129,382 A.2d 413 (Law Div. 1977); *Caldwell v. Lambrou*, 161 N.J. Super. 284, 391 A.2d 590 (Law Div. 1978).

K. Negotiations and collective bargaining of public employees.

1. Any sessions regarding collective bargaining.

All discussion regarding a collective bargaining agreement or terms and conditions proposed for inclusion in an agreement may be held in closed session.

2. Only those between the public employees and the public body.

Likewise, all negotiating sessions with public employees or their representatives may be conducted in private. N.J.S.A. 10:4-12b(4).

L. Parole board meetings, or meetings involving parole board decisions.

The parole board or any agency or body acting in a parole capacity is specifically exempted from coverage by the Sunshine Law, N.J.S.A. 10:4-8a, and therefore all meetings regarding parole matters may be held in closed session.

M. Patients; discussions on individual patients.

Discussions regarding individual patients and patient records may be held in closed session. N.J.S.A. 10:4-12b(3).

N. Personnel matters.

All discussions regarding the employment or appointment of a public employee, including interviews, and all discussions regarding evaluation, promotion, disciplining or termination of a public employee may be held in closed session unless the employee requests a public meeting in writing. N.J.S.A. 10:4-12b(8). Even where a public employee is guaranteed by state statute a public hearing on termination, the public body may go into closed session to deliberate. *See* N.J.S.A. 10:4-12b(9) and *Della Serra v. Mountainside*, 196 N.J. Super. 6, 481 A.2d 547 (App. Div. 1984). But where the public body is appointing a person to fill the unexpired term of an elected official, closure is not permissible. *Gannett v. Board of Education of Manville*, 201 N.J. Super. 65, 492 A.2d 703 (Law Div. 1984).

1. Interviews for public employment.

See N above.

2. Disciplinary matters, performance or ethics of public employees.

See N above.

3. Dismissal; considering dismissal of public employees.

See N above.

O. Real estate negotiations.

All discussions, including negotiations, involving the purchase, lease or acquisition of real property with public funds may be conducted in closed session. N.J.S.A. 10:4-12b(5).

P. Security, national and/or state, of buildings, personnel or other.

Discussions regarding “tactics and techniques” to be used in protecting the safety and property of the public may be conducted in closed session, provided that “disclosure could impair such protection.” N.J.S.A. 4:10-12b(6).

Q. Students; discussions on individual students.

Discussions regarding individual students and student records may be held in closed session. N.J.S.A. 10:4-12(b)(3).

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A. When to challenge.

1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

The Sunshine Law provides that any person may apply to the Superior Court “for injunctive orders or other remedies” to ensure compliance with the provisions of the statute. N.J.S.A. 10:4-16. An application for an injunction prohibiting a public body from holding a closed meeting or emergency session will receive an expedited hearing when done by Order to Show Cause. *See* N.J. Court Rules 4:52, 4:67 and 4:69.

2. When barred from attending.

When a public body votes to go into closed session at a public meeting, any person objecting to the closed session should ask to be heard and formally object to the closure, with a request that the minutes record the objection.

3. To set aside decision.

A suit to set aside any action of a public body taken in noncompliance with the Sunshine Law must be commenced within 45 days after the action sought to be voided has been made public. N.J.S.A. 10:4-15.

4. For ruling on future meetings.

Any person may apply to the Superior Court for a declaratory ruling on access to future meetings of a public body where it can be shown that there is a pattern or practice of noncompliance with the provisions of the Sunshine Law. *See* N.J.S.A. 10:4-16.

B. How to start.

There is no provision for an administrative challenge to any action of a public body taken in noncompliance with the Sunshine Law. All challenges must be made to the Superior Court by way of an action in lieu of prerogative writ. *See* N.J.S.A. 10:4-15 and 10:4-16.

1. Where to ask for ruling.

a. Administrative forum.

C. Court review of administrative decision.

1. Who may sue?

“Any person” may bring a suit in Superior Court “for injunctive orders or other remedies” to ensure compliance with the Sunshine Law or to void any action taken by a public body in noncompliance with the Sunshine Law. N.J.S.A. 10:4-15 and 10:4-16.

2. Will the court give priority to the pleading?

An application for injunctive relief or to void any action taken by a public body will be given an expedited hearing. *See* N.J. Court Rules 4:52, 4:67 and 4:69.

3. Pro se possibility, advisability.

It is usually inadvisable to attempt a *pro se* court action because of the substantive and procedural complexities involved.

4. What issues will the court address?

The court will address issues of injunctive relief to open the meeting, voiding of any action taken in noncompliance with the Sunshine Law, and right of access to future meetings.

5. Pleading format.

The court action is initiated by a Complaint in Lieu of Prerogative Writs which alleges the public body’s noncompliance with specific

provisions of the Sunshine Law and which requests specific forms of relief. *See* N.J.S.A. 10:4-15 and 10:4-16.

6. Time limit for filing suit.

A suit seeking access to a future meeting must be commenced before the meeting is conducted. A suit seeking to void any action taken by a public body in noncompliance with the Sunshine Law must be commenced within 45 days after the action sought to be voided has been made public. *See* N.J.S.A. 10:4-15.

7. What court.

The Complaint in Lieu of Prerogative Writ is filed in the Superior Court, Law Division, of the county wherein the public body is located.

8. Judicial remedies available.

The court can void any action taken by a public body in noncompliance with the Sunshine Law or issue injunctive relief or any other remedy necessary to ensure compliance with the Sunshine Law. *See* N.J.S.A. 10:4-15 and 10:4-16.

9. Availability of court costs and attorneys' fees.

Attorney fees are generally not awarded. *See* N.J. Court Rule 4:42-9. Costs may be taxed. *See* N.J. Court Rule 4:42-8.

10. Fines.

On complaint of the Attorney General or the County Prosecutor, any person who knowingly violates any provision of the Sunshine Law shall be fined \$100 for the first offense and \$500 for any subsequent offense. N.J.S.A. 10:4-17.

D. Appealing initial court decisions.

1. Appeal routes.

Appeal from an adverse decision of the Superior Court, Law Division is to the Appellate Division of the Superior Court. Appeal from the Appellate Division is to the Supreme Court.

2. Time limits for filing appeals.

The time limit for appeal to the Appellate Division is 45 days from entry of the final judgment or Order. Rule 2:4-1. A petition for certi-

fication seeking review by the Supreme Court of a final judgment of the Appellate Division must be filed within 20 days of entry of final judgment. Rule 2:13-3.

3. Contact of interested amici.

Amicus briefs on important Sunshine Law issues are filed by the New Jersey Press Association and/or some of the major newspapers circulated in New Jersey, such as the *Newark Star Ledger*, *The Trenton Times*, *The Philadelphia Inquirer*, *The New York Times* and the *Gannet* group newspapers. In addition, the Reporters Committee for Freedom of the Press frequently files *amicus* briefs when important Sunshine Law issues are before the New Jersey Supreme Court.

V. ASSERTING A RIGHT TO COMMENT.

A. Is there a right to participate in public meetings?

N.J.S.A. 10:4-12(a) requires that a body set aside a portion of every meeting, the length of which is to be determined by the governing body, for public comment on any governmental issue that a member of the public feels may be of concern to the residents of the municipality. This section is, however, limited to meetings of governing bodies and boards of education.

B. Must a commenter give notice of intentions to comment?

There is no statutory requirement but there may be a local bylaw of the public body requiring such notice.

C. Can a public body limit comment?

Yes. N.J.S.A. 10:4-12(a) specifically states that "Nothing in this act shall be construed to limit the discretion of a public body to ... regulate the active participation of the public at any meeting."

D. How can a participant assert rights to comment?

The statute is silent.

E. Are there sanctions for unapproved comment?

No specific sanctions are contained in the Open Public Meetings Act.

Statute

Open Records

New Jersey Statutes

Title 47. Public Records

Chapter 1A. Examination and Copies of Public Records

47:1A-1. Legislative findings

The Legislature finds and declares it to be the public policy of this State that :

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access ;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

47:1A-1.1. Definitions

As used in P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented:

"Biotechnology" means any technique that uses living organisms, or parts of living organisms, to make or modify products, to improve plants or animals, or to develop micro-organisms for specific uses; including the industrial use of recombinant DNA, cell fusion, and novel bioprocessing techniques.

"Custodian of a government record" or "custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented:

information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit;

any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members;

any copy, reproduction or facsimile of any photograph, negative or print,

including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner except:

when used in a criminal action or proceeding in this State which relates to the death of that person,

for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,

for use in the field of forensic pathology or for use in medical or scientific education or research, or

for use by any law enforcement agency in this State or any other state or federal law enforcement agency;

criminal investigatory records;

victims' records, except that a victim of a crime shall have access to the victim's own records;

trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;

any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;

administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;

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;

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;

information which, if disclosed, would give an advantage to competitors or bidders;

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;

information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;

information which is to be kept confidential pursuant to court order;

any copy of form DD-214, or that form, issued by the United States Government, or any other certificate of honorable discharge, or copy thereof, from active service or the reserves of a branch of the Armed Forces of the United States, or from service in the organized militia of the State, that has been filed by an individual with a public agency, except that a veteran or the veteran's spouse or surviving spouse shall have access to the veteran's own records; and

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 New Jersey Motor Vehicle Commission as permitted by section 2 of P.L.1997, c. 188 (C.39:2-3.4); 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 by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.

A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privi-

leged and confidential:

pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination;

records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;

valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access;

information contained on individual admission applications; and

information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.

“Public agency” or “agency” means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

“Law enforcement agency” means a public agency, or part thereof, determined by the Attorney General to have law enforcement responsibilities.

“Constituent” means any State resident or other person communicating with a member of the Legislature.

“Member of the Legislature” means any person elected or selected to serve in the New Jersey Senate or General Assembly.

“Criminal investigatory record” means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.

“Victim’s record” means an individually-identifiable file or document held by a victims’ rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim’s own records.

“Victim of a crime” means a person who has suffered personal or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime, or if such a person is deceased or incapacitated, a member of that person’s immediate family.

“Victims’ rights agency” means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board, established pursuant to P.L.1971, c. 317 (C.52:4B-1 et seq.).

47:1A-1.2. Access to biotechnology trade secrets by state and local agencies available only as allowed by federal law

a. When federal law or regulation requires the submission of biotechnology trade secrets and related confidential information, a public agency shall not have access to this information except as allowed by federal law.

b. A public agency shall not make any biotechnology trade secrets and related confidential information it has access to under this act available to any other public agency, or to the general public, except as allowed pursuant to federal law.

47:1A-2.2. Access to public records by inmates; victim’s personal identifying information

a. Notwithstanding the provisions of P.L.1963, c. 73 (C.47:1A-1 et seq.) or the provisions of any other law to the contrary, where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person’s victim or the victim’s family, including but not limited to a victim’s home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented shall be denied.

b. A government record containing personal identifying information which is protected under the provisions of this section may be released only if the information is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor’s defense shall be made by the court upon motion by the requestor or his representative.

c. Notwithstanding the provisions of P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, or any other law to the contrary, a custodian shall not comply with an anonymous request for a government record which is protected under the provisions of this section.

47:1A-3. Records of investigations in progress

a. Notwithstanding the provisions of P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to P.L.1963, c. 73 (C.47:1A-1 et seq.).

b. Notwithstanding the provisions of P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;

if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim’s family, and the integrity of any ongoing investigation, shall be considered;

if an arrest has been made, information as to the defendant’s name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any,

pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and

information as to circumstances surrounding bail, whether it was posted and the amount thereof.

Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.

47:1A-4. Repealed by L.2002, c. 404, § 17, approved Jan. 8, 2002

47:1A-5. Custodian of government records to permit inspection, examination and copying; certain information to be redacted; purchase of records; immediate access in certain circumstances

a. The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours; or in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census, a board of education having a total district enrollment of 500 or fewer, or a public authority having less than \$10 million in assets, during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less; unless a government record is exempt from public access by: P.L. 1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order. Prior to allowing access to any government record, the custodian thereof shall redact from that record any information 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 section 2 of P.L.1997, c. 188 (C.39:2-3.4); 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 by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor. Except where an agency can demonstrate an emergent need, a regulation that limits access to government records shall not be retroactive in effect or applied to deny a request for access to a government record that is pending before the agency, the council or a court at the time of the adoption of the regulation.

b. A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

c. Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies; provided, however, that in the case of a municipality, rates for the duplication of particu-

lar records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

d. A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.

If a request is for a record:

- (1) in a medium not routinely used by the agency;
- (2) not routinely developed or maintained by an agency; or
- (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be 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.

e. 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.

f. The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by P.L.1963, c. 73 (C.47: 1A-1 et seq.) as amended and supplemented, to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part;
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied. The custodian may require a deposit against costs for reproducing documents sought through an anonymous request whenever the custodian anticipates that the information thus requested will cost in excess of \$5 to reproduce.

g. A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

h. Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.

- i. Unless a shorter time period is otherwise provided by statute, regula-

tion, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor. If the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request. If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

j. A custodian shall post prominently in public view in the part or parts of the office or offices of the custodian that are open to or frequented by the public a statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record by any person for inspection, examination, or copying or for purchase of copies thereof and the procedure by which an appeal may be filed.

k. The files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.

47:1A-6. Proceeding to challenge access denial; bearing

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed 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

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c. 404 (C.47:1A-7).

The right to institute any proceeding under this section shall be 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. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

47:1A-7. Government Records Council; powers and duties; jurisdiction

a. There is established in the Department of Community Affairs a Government Records Council. The council shall consist of the Commissioner of Community Affairs or the commissioner's designee, the Commissioner of Education or the commissioner's designee, and three public members appointed by the Governor, with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The three public members shall serve during the term of the Governor making the appointment and until the appointment of a successor. A public member shall not hold any other State or local elected or appointed office or employment while serving as a member of the council. A public member shall not receive a salary for service on the council but shall be reimbursed for reasonable and necessary expenses associated with serving on the council and may receive such per diem payment as may be provided in the annual appropriations act. A member may be removed by the Governor for cause. Vacancies among the public members shall be filled in the same manner in which the original appointment was made. The members of the council shall choose one of the public members to serve as the council's chair. The council may employ an executive director and such professional and clerical staff as it deems necessary and may call upon the Department of Community Affairs for such assistance as it deems necessary and may be available to it.

b. The Government Records Council shall:

establish an informal mediation program to facilitate the resolution of dis-

putes regarding access to government records;

receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;

issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;

prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;

prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;

prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;

make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and

operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied;

In implementing the provisions of subsections d. and e. of this section, the council shall: act, to the maximum extent possible, at the convenience of the parties; utilize teleconferencing, faxing of documents, e-mail and similar forms of modern communication; and when in-person meetings are necessary, send representatives to meet with the parties at a location convenient to the parties.

c. At the request of the council, a public agency shall produce documents and ensure the attendance of witnesses with respect to the council's investigation of any complaint or the holding of any hearing.

d. Upon receipt of a written complaint signed by any person alleging that a custodian of a government record has improperly denied that person access to a government record, the council shall offer the parties the opportunity to resolve the dispute through mediation. Mediation shall enable a person who has been denied access to a government record and the custodian who denied or failed to provide access thereto to attempt to mediate the dispute through a process whereby a neutral mediator, who shall be trained in mediation selected by the council, acts to encourage and facilitate the resolution of the dispute. Mediation shall be an informal, non-adversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement. The mediator shall assist the parties in identifying issues, foster joint problem solving, and explore settlement alternatives.

e. If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of all parties, the council shall initiate an investigation concerning the facts and circumstances set forth in the complaint. The council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the council shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed. Otherwise, the council shall notify the records custodian against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The custodian shall have the opportunity to present the board with any statement or information concerning the complaint which the custodian wishes. If the council is able to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed. If the council is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), in so far as they may be applicable and practicable. The council shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented. If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, the council may impose

the penalties provided for in section 12 of P.L.2001, c. 404 (C.47:1A-11). A decision of the council may be appealed to the Appellate Division of the Superior Court. A decision of the council shall not have value as a precedent for any case initiated in Superior Court pursuant to section 7 of P.L.2001, c. 404 (C.47:1A-6). All proceedings of the council pursuant to this subsection shall be conducted as expeditiously as possible.

f. The council shall not charge any party a fee in regard to actions filed with the council. The council shall be subject to the provisions of the “Open Public Meetings Act,” P.L.1975, c. 231 (C.10:4-6), except that the council may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.

g. The council shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches.

47:1A-8. Common law right of access

Nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.

47:1A-9. Construction with other laws

a. The provisions of this act, P.L.2001, c. 404 (C.47:1A-1 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c. 73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

b. The provisions of this act, P.L.2001, c. 404 (C.47:1A-1 et al.), shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

47:1A-10. Personnel or pension records not considered government records; exceptions

Notwithstanding the provisions of P.L.1963, c. 73 (C.47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

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, shall be a government record.

47:1A-11. Violations

a. A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, 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. This penalty shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999,” P.L.1999, c. 274

(C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

47:1A-12. Court rules

The New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes of this act.

47:1A-13. Funding

The Commissioner of Community Affairs shall include in the annual budget request of the Department of Community Affairs a request for sufficient funds to effectuate the purposes of section 8 of P.L.2001, c. 404 (C.47:1A-7).

Open Meetings

Title 10

Chapter 4. Open Public Meetings

10:4-6. Short title

This act shall be known and may be cited as the “Open Public Meetings Act.”

10:4-7. Legislative findings and declaration

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

The Legislature further declares it to be the public policy of this State to insure that the aforesaid rights are implemented pursuant to the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof.

The Legislature, therefore, declares that it is the understanding and the intention of the Legislature that in order to be covered by the provisions of this act a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect persons’ rights; that, therefore, informal or purely advisory bodies with no effective authority are not covered, nor are groupings composed of a public official with subordinates or advisors, who are not empowered to act by vote such as a mayor or the Governor meeting with department heads or cabinet members, that specific exemptions are provided for the Judiciary, parole bodies, the State Commission of Investigation, the Apportionment Commission and political party organization; that to be covered by the provisions of this act a meeting must be open to all the public body’s members, and the members present must intend to discuss or act on the public body’s business; and therefore, typical partisan caucus meetings and chance encounters of members of public bodies are neither covered by the provisions of this act, nor are they intended to be so covered.

10:4-8. Definitions

As used in this act:

a. “Public body” means a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this

State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds including the Legislature, but does not mean or include the judicial branch of the government, any grand or petit jury, any parole board or any agency or body acting in a parole capacity, the State Commission of Investigation, the Apportionment Commission established under Article IV, Section III, of the Constitution, or any political party committee organized under Title 19 of the Revised Statutes.

b. “Meeting” means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering.

c. “Public business” means and includes all matters which relate in any way, directly or indirectly, to the performance of the public body’s functions or the conduct of its business.

d. “Adequate notice” means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be

(1) prominently posted in at least one public place reserved for such or similar announcements,

(2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and

(3) filed with the clerk of the municipality when the public body’s geographic boundaries are coextensive with that of a single municipality, with the clerk of the county when the public body’s geographic boundaries are coextensive with that of a single county, and with the Secretary of State if the public body has Statewide jurisdiction. For any other public body the filing shall be with the clerk or chief administrative officer of such other public body and each municipal or county clerk of each municipality or county encompassed within the jurisdiction of such public body. Where annual notice or revisions thereof in compliance with section 13 of this act set forth the location of any meeting, no further notice shall be required for such meeting.

10:4-9. Meeting of public body; adequate notice to public; necessity; exceptions

a. Except as provided by subsection b. of this section, or for any meeting limited only to consideration of items listed in section 7. b. no public body shall hold a meeting unless adequate notice thereof has been provided to the public.

b. Upon the affirmative vote of three quarters of the members present a public body may hold a meeting notwithstanding the failure to provide adequate notice if:

(1) such meeting is required in order to deal with matters of such urgency and importance that a delay for the purpose of providing adequate notice would be likely to result in substantial harm to the public interest; and

(2) the meeting is limited to discussion of and acting with respect to such matters of urgency and importance; and

(3) notice of such meeting is provided as soon as possible following the calling of such meeting by posting written notice of the same in the public place described in section 3. d. above, and also by notifying the two newspapers described in section 3. d. by telephone, telegram, or by delivering a written notice of same to such newspapers; and

(4) either

(a) the public body could not reasonably have foreseen the need for such meeting at a time when adequate notice could have been provided; or

(b) although the public body could reasonably have foreseen the need for

such meeting at a time when adequate notice could have been provided, it nevertheless failed to do so.

10:4-9.1. Notice of public meetings through the Internet

In addition to the notice requirements of the “Open Public Meetings Act,” P.L.1975, c. 231 (C.10:4-6 et seq.), a public body may provide electronic notice of any meeting of the public body through the Internet.

As used in this section, “electronic notice” means advance notice available to the public via electronic transmission of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken at such meeting.

As used in this section, “Internet” means the international computer network of both federal and non-federal interoperable packet switched data networks.

10:4-9.2. Electronic notice not a substitute for adequate notice requirements

Nothing in this act shall be construed as affecting or superseding the adequate notice requirements that are imposed by the “Open Public Meetings Act,” P.L.1975, c. 231 (C.10:4-6 et seq.) and no electronic notice issued pursuant to this act shall be deemed to substitute for, or be considered in lieu of, such adequate notice.

10:4-10. Statement in minutes of meeting on adequate notice

At the commencement of every meeting of a public body the person presiding shall announce publicly, and shall cause to be entered in the minutes of the meeting, an accurate statement to the effect:

a. that adequate notice of the meeting has been provided, specifying the time, place, and manner in which such notice was provided; or

b. that adequate notice was not provided, in which case such announcement shall state (1) the nature of the urgency and importance referred to in subsection 4. b. (1) and the nature of the substantial harm to the public interest likely to result from a delay in the holding of the meeting;

(2) that the meeting will be limited to discussion of and acting with respect to such matters of urgency and importance;

(3) the time, place, and manner in which notice of the meeting was provided; and

(4) either

(a) that the need for such meeting could not reasonably have been foreseen at a time when adequate notice could have been provided, in which event, such announcement shall specify the reason why such need could not reasonably have been foreseen; or

(b) that such need could reasonably have been foreseen at a time when adequate notice could have been provided, but such notice was not provided, in which event the announcement shall specify the reason why adequate notice was not provided.

10:4-11. Failure to invite portion of members to circumvent provisions of act; prohibition

No person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act.

10:4-12. Meetings open to public; exclusion of public; subject matter of discussion

a. Except as provided by subsection b. of this section all meetings of public bodies shall be open to the public at all times. Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting, except that a municipal governing body shall be required to set aside a portion of every meeting of the municipal governing body, the length of the portion to be determined by the municipal governing body, for public comment on any governmental issue that a member of the public feels may be of concern to the residents of the municipality.

b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(1) Any matter which, by express provision of Federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.

(2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.

(3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

(6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

(9) Any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.

10:4-13. Exclusion of public; resolution; adoption; contents

No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

a. Stating the general nature of the subject to be discussed; and

b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

10:4-14. Minutes of meetings; availability to public

Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.

10:4-15. Proceeding in lieu of prerogative writ to void action at nonconforming meeting; parties; limitation; corrective or remedial action

a. Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act.

b. Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void.

10:4-16. Injunctive orders or other remedies to insure compliance

Any person, including a member of the public, may apply to the Superior Court for injunctive orders or other remedies to insure compliance with the provisions of this act, and the court shall issue such orders and provide such remedies as shall be necessary to insure compliance with the provisions of this act.

10:4-17. Violations; penalty; statement at meeting of nonconformance; inclusion in minutes

Any person who knowingly violates any of the foregoing sections of this act shall be fined \$100.00 for the first offense and no less than \$100.00 nor more than \$500.00 for any subsequent offense, recoverable by the State by a summary proceeding under "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.). The Superior Court shall have jurisdiction to enforce said penalty upon complaint of the Attorney General or the county prosecutor. Whenever a member of a public body believes that a meeting of such body is being held in violation of the provisions of this act, he shall immediately state this at the meeting together with specific reasons for his belief which shall be recorded in the minutes of that meeting. Whenever such a member's objections to the holding of such meeting are overruled by the majority of those present, such a member may continue to participate at such meeting without penalty provided he has complied with the duties imposed upon him by this section.

10:4-18. Schedule of regular meetings of public body; publicity; revision; procedure

At least once each year, within 7 days following the annual organization or reorganization meeting of a public body, or if there be no such organization or reorganization meeting in the year, then by not later than January 10 of such year, every public body shall post and maintain posted throughout the year in the place described in subsection 3. d. (1), mail to the newspapers described in subsection 3. d. (2), submit to the persons described in subsection 3. d. (3), for the purpose of public inspection a schedule of the regular meetings of the public body to be held during the succeeding year. Such schedule shall contain the location of each meeting to the extent it is known, and the time and date of each meeting. In the event that such schedule is thereafter revised, the public body, within 7 days following such revision, shall post, mail and submit such revision in the manner described above.

10:4-19. Requests for notices of meetings; annual renewal

Any person may request that a public body mail to him copies of any regular meeting schedule or revision described in section 13 of this act and any advance written notice described in subsection 3. d. of this act of any regular, special or rescheduled meeting of such body, and upon prepayment by such person of a reasonable sum, if any has been fixed by resolution of the public body to cover the costs of providing such notice, the public body shall mail to such person written advance notice of all of its meetings within the time prescribed by subsection 3. d. herein, subject only to the exceptions set forth in subsection 4. b. herein. Such resolution may provide that notice requested by the news media

shall be mailed to such news media free of charge. All requests for notices made under this section shall terminate at midnight on December 31 of each year, but shall be subject to renewal upon a new request to the public body.

10:4-20. Severability

If any section, subsection, clause, sentence, paragraph, or part of this act or the application thereof to any person or circumstances, shall, for any reason,

be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act.

10:4-21. Liberal construction

This act shall be liberally construed in order to accomplish its purpose and the public policy of this State as set forth in section 2.

