

GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

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LESSON PLAN AND EVALUATION**

INTRODUCTION TO OPRA [OPEN PUBLIC RECORDS ACT]

With

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And featuring

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Program description

OPRA is your entry point to accessing the records of your government. This 1.5 credit CLE seminar will teach you how the statute works and how you can overcome objections from government officials when you ask to see their records.

I. Introduction

- Cheryl Cohen, Assistant Camden County Prosecutor (retired)
 - Records custodian for Prosecutor's Office
- Recent changes in the law – OPRA does not apply to judiciary
- Judiciary has its own “OPRA” under Rules of Court, R. 1:38 – similar language to OPRA

II. Ways to Get Information from the Government

- A. Criminal discovery
 - Pursuant to court rules – entitled to reciprocal discovery
 - Rule 7:7-7 (Municipal Court); Rule 3:13 (Superior Court – post-indictment)
 - No right to discovery pre-indictment unless there is a pre-indictment conference scheduled – entitled to limited discovery
 - Pre-indictment discovery would be available if potentially able to resolve case pre-indictment – even if pre-indictment discovery is not formally available pursuant to Court Rule
 - If PIC case (Pre-Indictment Case) required to turn over discovery if engaged in plea negotiations
 - Facilitates plea negotiations
- B. Rule 1:38 – Public Access to Court Records and Administrative Records
 - Records from judiciary
 - Tracks OPRA in many respects
 - Public policy of access to records by members of the public from judiciary
 - Requirement that some records maintain confidentiality in perpetuity, i.e. children, pedigree information, social security numbers, confidential informants, etc.
 - General policy toward access but recognition that some records are not available – balance of interests codified in the Rule
 - Expungement application – name of applicant is kept confidential
- C. New Jersey Common Law
 - Some differences between common law right of access and OPRA
 - OPRA did not repeal common law
 - They are independent but live together, i.e. OPRA anyone for any reason can request record – no nexus to requested document vs. common law requires there be a connection – what you are entitled to may differ
 - Common law requires there be a connection entitling you to the information balance against the government's need to keep the records private
 - In the absence of OPRA, common law was utilized for requesting records
 - Common law was felt to be inadequate in many ways

- D. OPRA – Open Public Records Act
 - Documents should be viewed as available unless specifically exempted by statute
 - No need for reason request (vs. common law)
 - Under context of prosecutor’s office –
 - “Criminal investigatory records” (when police reports detailing surveillance that is ongoing; anything regarding gathering of information to determine whether a matter will be prosecuted) are *exempt in perpetuity* – primarily a law enforcement issue, not evaluated as to whether the matter will be prosecuted
 - Ongoing investigation – balancing of how much or should there be records released – *when investigation is concluded then record may be available* – further evaluation of records must be done at that time
 - Timing for re-evaluation/triggering mechanism – as a practical matter, if information has been released in a criminal investigation to the public then the records are released and available; “cat is out of the bag”; nothing specifically identifies when this occurs

III. OPRA – How it Functions, Processes, and Procedures

- Who is requesting information
 - Public interest being met when media asks for information – oversight of government
- Method of obtaining documents
 - Request made for particular information
 - Government is not required to create a document in response to the request – access to information that must be collated is not responsibility of public entities – the document either exists or it does not
 - Is it a government record that exists??
 - Should it be released or does it fall under an exemption?
- Responses to OPRA requests
 - The statute does no care who is asking or for what reason
 - Some people have made requests for other than legitimate information/interests
 - What are they asking for and are they entitled to it??
 - Length of request may be considered; special costs are burden of requester
 - Overbroad request is addressed in the statute – government agency must provide reason why it is overbroad in response such a request
 - Specific time period to respond to OPRA requests – therefore requests that are overbroad or may take longer than prescribed period may not be filled

- Records Custodian for OPRA
 - Reactive as opposed to proactive
 - Requests come directly to custodian – then time period under statute begins
 - There are back ups so that there is always a custodian there during regular business records
 - Custodian must respond to certain things immediately – budget meetings, election information; etc.; but has up to 7 days to respond to other requests
 - Must fulfill within 7 days, should not wait 7 days if can fulfill request sooner
 - If unable to fulfill within 7 days then must contact requester and explain why, i.e. location of records
 - If not fulfilled in time, then deemed a denial of the request and then other actions can be taken
 - Requestor can indicate how they want information, i.e. inspection, digital copy, hard copy – if can be done by agency, then ok; problematic if requester wants a digital copy but agency does not have ability to accommodate that request
 - Requests can be transmitted in any manner: fax, in person, mail, etc.
 - Statute designates in the municipalities if no OPRA designee, then municipal clerk
- Types of requests:
 - Press
 - People looking for business, i.e. every complaint signed during a particular week at law enforcement agencies
 - Defendant serving life sentence in prison wanted personal information of every police officer, investigating officer, witness involved in his case [CCPO turned over records that had already been used at trial]
- If OPRA request denied, Government Records Council evaluates request and financial penalties for OPRA custodian if the denial was inappropriate
 - Requester must go to Government Records Council – appeal of records custodian (administrative decision)
 - Denial is required in writing from initial agency requested to provide documents
 - Statute of limitations for such an appeal is only 45 days from denial
 - Requester can go through Superior Court as opposed to Government Records Council
 - Custodian being held accountable before GRC
 - GRC attorney is Attorney General's Office; supervisory agency of Prosecutor's Office is Attorney General's Office

- \$1000 sanction for wrongfully withholding government records – first offense
- Sanctions are *personally* against records custodian
- Speak with supervisor/legal advisor to get sound legal advice if intend to deny records access if there is an issue – protection against personal liability when acting in official capacity
- County prosecutor’s office network of records custodians to discuss issues, specific requests
- OPRA cases/decisions not all are published – GRC cases, Appellate Division cases, Supreme Court cases – websites
- If called before the GRC, prepare briefs, certifications – be prepared! – treat response as if going before Appellate Division
- Litigating through the courts (as opposed to GRC)
 - OPRA supposed to be citizen friendly – GRC would be more comfortable; attorneys would be more comfortable in court
 - It takes longer to go through court system as opposed to GRC
 - Appellate Division has statewide implications

IV. Development of OPRA Caselaw

- More clarity in terms of what should be made available
- Records custodians are understanding that exemptions are narrowly construed
- Good reason for delay should be known to requester – acting reasonably is the model of how to be successful - *reasonableness*
- Definition of government record had developed
- How unreasonable demands calling for thousands of records are to be handled – there is an exemption for voluminous records
- How much to charge for records – “actual costs”
- Libertarian Party of Central New Jersey v. Murphy, 382 N.J. Super. 136, 139 (App. Div. 2006) – municipality had ordinance for \$50 payment for a copy of a CD; App Div said not about profit, making things accessible to public
- If there is a need to adjust record as existed, and time is taken to review documents – requester should know that he/she will pay more than 5-7 cents per page

V. A Hypothetical Situation

- Request by ACLU for all the license plates run by a particular police officer in order to statistically determine whether the officer is using racially motivated basis to run plates and stop individuals.
 - This would call for an enormous amount of information
 - Does this document exist?? Responsive? Government record?
 - Must see if there is a reason to provide it?
 - If there is a log that has plate and ethnicity of driver, then look at whether there is an exemption.

- Plate information is law enforcement because can get personal information for owners, but plates themselves is not necessarily an issue – just ability to get personal information (would have to go to MVC)

VI. How Will the Digital Era Effect/Affect OPRA?

- Statute already acknowledges digital technology regarding how records are kept
- Changes of availability
- Digital records are forever available vs. records retention policies for paper records currently enforced
- Number of digital records will increase exponentially – private information protection?
- Expungements are “hidden” vs. destroyed
- Privacy matters will be more easily maintained because now custodian is making redactions but in the future we can program a computer to remove human error to redact – easier to adhere to statute

VII. Words of Advice

- For record seekers
 - Use agency’s OPRA form
 - Put request in writing
 - Include all information agency needs to respond to request
 - Be specific with your request
 - Familiarize yourself with GRC website
 - Attorney v. pro se – depends on what you are looking for – statute designed for people to request
 - Denials are when attorneys get involved, usually
- For attorneys
 - Know caselaw
 - Get a feel for more recent GRC decisions – panel members change, so decisions change over time
 - Find out what records the agency is claiming it doesn’t have and explore that deeply
 - Know how agency runs in order to look for things
 - 150 cases, not all published, should be reviewed
 - Very specific area
 - Personal liability of records custodians should be kept in mind – don’t guess, ask a question (legal advisor)