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Major OPRA Amendments Take Effect September 3, 2024

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Ready or not, the 2024 amendments to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA"), signed into law on June 5, 2024, by Governor Murphy, take effect on September 3, 2024. These amendments, which are the first major changes to OPRA since the law became effective in 2002, have many aspects of which practitioners should be aware, including those that create traps, set important deadlines, and change how practitioners will be able to use OPRA going forward.

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1. Limitations on the Use of OPRA by a Party to a Legal Proceeding

In a major change, the new OPRA bars parties to a "legal proceeding" from "request[ing] a government record if the record sought is the subject of a court order, including a pending discovery request[.]" The amendments do not define a "legal proceeding," and the change applies to all requests without regard to whether the public agency is a party to the legal proceeding. Furthermore, requestors must now certify "whether the government record is being sought in connection with a legal proceeding and identify the proceeding for the request to be fulfilled."

While the amendments do not define a "legal proceeding," the amendments define a "party" to a legal proceeding to include "a party subject to a court order, any attorney representing that party, and any person acting as an agent for or on behalf of that party." This broad language will make it difficult, at best, for requestors to create workarounds for this new limitation.

As a result, the use of OPRA as a discovery tool during the pendency of legal proceedings will probably be substantially curtailed, if not eliminated. However, it stands to reason that the use of OPRA prior to a legal proceeding should increase. In addition, subpoenas will likely replace OPRA as practitioners' preferred tool to secure documents and information from public agencies during legal proceedings.

Furthermore, because the terms "legal proceeding," "subject to a court order," and "pending discovery request" are not defined terms in the amendments, courts will probably be asked to parse out whether the amendments leave any room for the use of OPRA while a legal proceeding is pending.

2. New Retroactive Standing Requirement

Under prior case law, OPRA requestors who filed OPRA requests anonymously could not enforce those requests anonymously in court, absent a specific authorization based on statute, court rules, or other "compelling reason." A.A. v. Gramiccioni, 442 N.J. Super. 276, 284 (App. Div. 2015). The amendments essentially codify this case. Most importantly, in any case currently pending before the GRC or Superior Court (including any related appeals), if the original filing party used an anonymous or fictitious name or identity, the plaintiff(s) must amend their filing to "accurately identif[y] their name and mailing address within 90 days of the effective date of" the amendments, which deadline would be December 2, 2024. Any complaint that does not contain an accurate name and mailing address after the passage of this 90-day deadline may be dismissed with prejudice by the court upon the application of the records custodian.

This new requirement raises serious questions for practitioners who represent students, parents of students with disabilities, crime victims, and other individuals whose identity is protected under state, federal law or court rules. This amendment creates a trap for plaintiffs who are proceeding anonymously or fictitiously in OPRA cases and appeals and requires both plaintiff-side counsel and defense-side counsel to review all their pending OPRA cases to determine whether the complaints are impacted by the new requirement. Then practitioners must decide whether to amend their complaints and reveal the name and address of a person whose identity may otherwise be protected by another law, seek leave to file the amendment under seal, or pursue other relief.

3. New "Commercial Purpose" Category

The amendments also create a new category of requestor, which is the "commercial purpose" requestor. "Commercial purpose" is defined by how the requestor intends to use the government record. Thus, the "commercial purpose" category covers more than just commercial entities; it includes individuals who intend to use the record "for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee." However, it exempts the news media, journalists, educational, scientific, scholarly, or governmental organizations, candidates and political committees, labor organizations, non-profits who do not sell the records for a fee, and, under certain circumstances, signatories to collective bargaining agreements from this definition.

All requestors must certify in their OPRA request whether the record will be used by themselves or another person for a commercial purpose. A requestor who "intentionally" fails to certify that a request is for a commercial purpose may be fined a civil penalty of $1,000 for the first offense, $2,500 for the second offense, and $5,000 for each subsequent offense. The Superior Court has jurisdiction to impose these penalties.

The consequences of a request being categorized as "for a commercial purpose" are somewhat limited. First, the deadline for most records custodians to respond to commercial requests will be 14 business days, rather than 7 business days, and some fire districts will have an additional 7 business days (for a total of 21 days to respond). Second, for a premium of "two times the cost of the production of the record," commercial requestors may demand that records custodians provide the records within 7 business days.

One issue raised by the commercial purpose rule is whether an attorney in private practice who makes a request on behalf of a client has a "commercial purpose," if the client does not have a commercial purpose. This issue is not addressed in the amendments, and likely will have to be sorted by the courts.

4. New Form Requirements

Under the amendments, public agencies are now required to adopt official OPRA forms, and the GRC is required to establish a "uniform government record request form." In response to this mandate, the GRC has created a link on its website to a "portal" that enables public agencies to create OPRA request forms. The forms must include spaces for requestors to certify whether the request is for a commercial purpose and whether the request is related to a legal proceeding.

Consistent with Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), requestors are not required to use adopted forms, provided that their written request includes "all of the information required on the adopted form." But because valid requests must now include certifications regarding a requestor's commercial purpose and related legal proceedings, the best practice will probably be to use an agency's form or online portal to avoid inadvertent omissions, as the failure to provide these certifications are grounds for denying the request.

5. New Private Right of Action Against Requestors

Last, but most certainly not least, the amendments created a cause of action in favor of public agencies against requestors who submit OPRA requests "with the intent to substantially interrupt the performance of government function."

Like an OPRA case, the lawsuit must be initiated via verified complaint and order to show cause and proceed as a summary proceeding. The action must also be accompanied by a "declaration" stating that the public agency has complied with OPRA and has made a "good faith effort to reach an information resolution of the issues relating to the records requests." If the agency proves by clear and convincing evidence that the requestor intended to "substantially interrupt the performance of government function," the Court has broad authority to limit the scope and number of OPRA requests and order "such other relief as it deems appropriate[.]"

However, public agencies who are considering filing such lawsuits should also consider the possibility that the subjects of such lawsuits may rely on New Jersey's relatively new Anti-SLAPP statute, N.J.S.A. 2A:53A-49 to -61, to oppose such actions. Defendants who successfully use the Anti-SLAPP statute to dismiss lawsuits against them are entitled to prevailing party counsel fees against the public agency.

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