

## MEMO

To: John O'Brien and George White  
From: Thomas J. Cafferty and Nomi I. Lowy  
Date: June 24, 2009  
RE: Meeting with Government Records Council (GRC)

Our File No. 9970.3200

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On June 23, 2009, we met with Robin Tabakin (Chairwoman, GRC), Catherine Starghill (Executive Director, GRC), Karyn Gordon (In-House Counsel, GRC), and Debra Allen (Deputy Attorney General) to discuss issues raised by NJPA regarding the Government Records Request forms utilized by various State agencies, including the GRC. NJPA's position was that the forms, and on-line instructions relating to submission of the forms, did not comply with the mandates of OPRA. We agreed to meet with representatives of the GRC in an attempt to amicably resolve the issues raised.

The meeting was very successful. The GRC agreed that each issue raised by NJPA was, in fact, a problem and we discussed various ways in which those problems could be resolved. Below is a synopsis of the issues discussed and the manner in which each will be addressed:

**1. Use of agency form**

Although the GRC had taken the position that, in order to make a valid OPRA request, a requestor was required to utilize the agency's form, the decision in Renna v. Union County has obviously changed their position. Catherine Starghill advised that she is in the process of drafting and issuing an "Alert" that will go out explaining that an OPRA request cannot be denied simply because an agency form is not used. In addition, the State will delete any provision on the form that indicates that use of an agency's form is required in order to make a valid OPRA request.

**2. Request for government records under the common law**

At the meeting, we raised the issue of whether it would be appropriate and beneficial to include on an OPRA request form a space for a requestor to also make a request for records under the common law. As it stands, a requestor who utilizes an agency form to make an OPRA request

would have to submit a second writing in order to request the very same records under common law. The GRC was amenable to the idea of permitting a requestor to make a common law request for records on the OPRA form, but was concerned about certain logistics. There was a discussion of including a space for a common law request on the form, an explanation of the common law right to access, and a notice that any appeal of a denial of a common law request could not be made to the GRC (as the GRC only has jurisdiction over OPRA requests, not common law) but that an appeal could be taken to the Superior Court directly. We agreed that our office would draft proposed language for inclusion on the form.

**3. Response to OPRA request must be given within 7 days of receipt, not review of OPRA request**

The current form used by the State provides that the seven business day response time does not commence until the proper custodian reviews the request to determine if it is complete. NJPA argued that the statute provides for a response within seven days of "receipt" of the request, not review. The GRC agreed with NJPA and agreed to change the form in this regard.

With regard to requests that are submitted to someone other than the designated custodian, the GRC urged that these requests create a problem for governmental agencies, as they may not reach the appropriate custodian in time for the custodian to respond within the statutorily mandated time frames. Thus, the State form currently provides:

If you submit a request for access to government records to someone other than the appropriate custodian, do not complete the Government Records Council request form, or attempt to make a request for access by telephone or fax; the Open Public Records Act and its deadlines, restrictions and remedies will not apply to your request.

NJPA argued that such language was inappropriate in light of the express language in OPRA that provides:

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.

The GRC agreed and it was ultimately decided our office would draft proposed language for the form, which would provide that, if there is a designated custodian by agency action (a requirement of OPRA), and the request is properly submitted to that custodian, a response must be provided within the seven business days of receipt of the request. However, if the OPRA request is not submitted to the designated custodian, but is (1) faxed to the usual fax number for the governmental entity, with a record of successful transmission on the requestor's end; (2) emailed to the usual email address of the governmental entity, with an electronic record of such item having been sent on requestor's end; and/or (3) mailed to the usual place of business of the governmental entity, with some sort of proof of such mailing e.g. certified mail receipt, proof of mailing certificate, etc., then the seven day time period begins to run on the date of faxing or emailing or three days from the date of such proof of mailing if sent by regular mail (or, the next day after mailing if sent by overnight delivery).

**4. Deposit required**

The current form provides:

You may be charged a 50% or other deposit when a request for copies exceeds \$25.

NJPA argued that OPRA only allows a custodian to require a deposit against costs for reproducing documents sought ***through an anonymous request*** when the custodian anticipates that the information requested will cost in excess of \$5.00 to reproduce.

The GRC agreed with NJPA's position and will amend the form to reflect that, for standard OPRA requests, no deposit will be required unless the request is made anonymously, in which case a deposit may be required if the custodian anticipates that the cost of reproduction will be in excess of \$5.00.

However, the GRC expressed concern with problems that have arisen when requestors (including law firms) request a substantial volume of records, which a custodian copies at the expense of the governmental entity, and then the requestor does not pick up or pay for the documents. It was agreed that, in situations where a special service charge is appropriate and the amount of the special service charge is communicated to the requestor, as OPRA requires, and the requestor approves of the amount, the requestor may be required to pay a deposit or in full prior to reproduction of the documents. In the case of a voluminous request, which does not warrant a special service fee, the governmental entity can provide the requestor with the estimated cost of reproduction and obtain an affirmative written acknowledgment of responsibility for payment upon receipt of the material. If the requestor then does not pay the amount, the governmental entity has a breach of contract claim that it can pursue against the requestor.

##### **5. Website instructions/information**

The GRC agreed that, to the extent that the GRC and/or Attorney General's website instructions or information are inconsistent with the above, the websites will be changed.