



Government Transparency in a Novel Time of Pandemic



Law Changes Alter Access to Information in Times of Emergency

by Walter M. Luers

The current novel coronavirus crisis has focused transparency advocates and government watchdogs on two new changes in OPRA and OPMA, and a 2005 law, the Emergency Health Powers Act, which is being applied for the first time.



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On March 20, 2020, in the early days of the COVID-19 crisis, New Jersey amended the Open Public Meetings Act, N.J.S.A. 10:4-6 *et seq.* and the Open Public Records Act, N.J.S.A. 47:1A-1 *et seq.* Regarding OPRA, the State of New Jersey added one paragraph that modified the seven-business-day deadline for records custodians to respond to OPRA requests during an emergency.¹ The Legislature removed the deadline during times of emergency, instead requiring records custodians “make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.”²

The pandemic also brought to the foreground a 2005 law, the Emergency Health Powers Act, N.J.S.A. 26:13-1, *et seq.* As implied by its name, the EHPA is principally concerned with public health emergencies. However, one sentence in the EHPA excluded broad categories of records from public access: “Any correspondence, records, reports and medical information made, maintained, received or filed pursuant to this act shall not be considered a public or government record under [OPRA].”³

One criticism of the EHPA’s constraint on access is that the limitations

were simply not necessary under existing law. At the time the EHPA was passed, OPRA contained or incorporated restrictions on access to medical records,⁴ security measures and techniques,⁵ ongoing civil and criminal investigations,⁶ information in which a person has a reasonable expectation of privacy,⁷ records “concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency,”⁸ and information and records of residents in long-term care facilities.⁹ Due to the breadth of the limitation—“any correspondence, records, reports and medical information made, maintained, received or filed pursuant to this act”—nearly every record relating to the public health emergency is confidential.¹⁰ Even statistical reports and analysis, such as the number of deaths at individual nursing homes and hospitals, which do not contain personally identifiable information, are non-public unless, in its discretion, public entities choose to release such information.

This is the opposite of transparency. Under OPRA, exemptions to access must be construed narrowly, subject to the exceptions contained within OPRA. In contrast, during the public health emergency, the government has applied the EHPA’s records exemption broadly so as to exclude wide categories of records

and information from public access.

In defense of the EHPA’s restrictions on records access, public agencies may argue that when responding to OPRA requests during a health emergency, they should not be required to parse through a patchwork of applicable records exceptions contained within OPRA, other State statutes, State regulations, a fifty-seven-year-old executive order, and federal laws (*e.g.*, HIPAA’s privacy rule). Notwithstanding, during a genuine emergency, records custodians have the right to deny an OPRA request if fulfilling the response would substantially disrupt agency operations and they have customarily requested extensions of time to respond, when needed.¹¹

Nevertheless, the blanket exemption for records and information relating to any public health emergency has created a potentially insurmountable and permanent access barrier to important records that should be public. Even one of the EHPA’s sponsors has stated that the records exceptions in the law were never intended to be as broad-reaching as they have proven to be during the current crisis.¹² That being the case, the Legislature should consider an amendment that limits denials of access to these records during an emergency, and subsequently makes the records available once the state of emergency is over (subject to other applicable exceptions).

Similarly, the state’s hurried OPRA

amendment was also unnecessary under existing law. As discussed above, records custodians may deny access to records if fulfilling the request would substantially disrupt agency operations (provided that the records custodian first attempted to reach a reasonable resolution). Also, OPRA requires a response within seven “business” days, not calendar days. If an emergency forced the closing of a public agency’s offices for a period of days or even weeks, that time would likely not count as “business days,” thus tolling the records custodian’s time to respond.

ble,” suggests that upon receipt of a records request during a state of emergency, the records custodian must prioritize their response to OPRA requests above all other priorities.

However, in the context of OPRA, the phrasing “as soon as possible” in the law has not always translated into practice. Prior to this most recent amendment, the phrases “as soon as possible,” “to the maximum extent possible” and “as expeditiously as possible” each appear once in OPRA. First, records custodians must grant or deny access to a record “as soon as possible, but not later than

rare, and no published decision provides a definitive rule for how quickly records custodians must deliver records. Records custodians who intend to rely on the new protections of the recent amendment should still do their best to provide a prompt initial written response, to establish a firm date for providing a final response, and to advise the requestor of the specific facts that justify prolonged time extensions. Requests for extensions that set no deadline for a reply or tie the response date to the lifting of an emergency declaration must be avoided, as they invite litigation. Agencies should

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Depending on interpretations of the amendment, it may impose a greater burden on records custodians to respond to OPRA requests. The coronavirus presents a broader and more problematic series of difficulties for records custodians: Government offices have been closed to the public, many public employees were required to work from home and/or self-quarantine, and access to records by remote means, especially paper records, was disparate. These facts are presumably the basis for the Legislature’s decision to relieve public agencies of the requirement to respond to OPRA requests within seven business days and, instead, require that records custodians “shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.”¹³ This language, “as soon as possi-

seven business days after receiving the request[.]” Second, the Government Records Council must “act, to the maximum extent possible, at the convenience of the parties [by utilizing] teleconferencing, faxing of documents, email and similar forms of modern communication[.]” Third, “All proceedings of the [GRC] shall be conducted as expeditiously as possible.”¹⁴ Frequent requestors and their attorneys know that access to records is regularly not granted or denied in seven business days. Rather, custodians request or, more generally, provide themselves response time extensions that well exceed seven business days. And while the GRC does permit parties to file documents via email and generally conducts mediations via teleconference, individual case adjudications often take several months or years.¹⁵

Litigation regarding response delays is

expect requestors to ask courts to enforce the crisis-era law as it was written; judges who have had to carry on court business during the pandemic may be receptive.

Additionally, on March 20, 2020, New Jersey made two key changes to OPMA. First, the amendment primarily granted public bodies the ability, during an emergency, to use a “means of communication or other electronic equipment” to “(1) conduct a meeting and any public business to be conducted thereat; (2) cause a meeting to be open to the public; (3) vote, or (4) receive public comment.”¹⁶ Second, the amendment granted authority to a public agency, during an emergency, to “elect to provide electronic notice [of a public meeting] and shall not be deemed to have violated any provision of law...in providing such electronic notice.”¹⁷ While it is an incremental advance in the law to allow public agencies to post

electronic notices of their meetings, there is no reason to limit this Legislation solely to times of emergency. Many agencies currently post their meeting notices online, and the public relies upon agency websites for such information. Thus, the burden would be low relative to the public benefits. Also, the Legislature does a disservice to the public when they relieve public agencies of the original obligation to transmit notice of the meetings to two newspapers under those circumstances. While public agencies are not required to advertise such meetings, and newspapers are not required to post those notices, many newspapers do. The New Jersey Press Association has a website dedicated to publishing a searchable database of public notices.¹⁸ As more people rely on the internet and the use of personal devices to stay connected, especially in times of crisis, the OPMA should require electronic notice of meetings at all times, not just during an emergency.

Holding public meetings electronically is another good idea. However, the application should not be limited to times of emergency. For years, practitioners have acknowledged that public agencies could hold public meetings via conference call, provided that the public is given advance notice, the opportunity to listen, and the means to comment on the record. Any form of secret meeting (via conference call, internet, or in-person) or email is barred by the OPMA. Public meetings via conference calls have always been legal but have historically been difficult to administer. The concept of using platforms such as Zoom to allow the public to watch and participate in meetings remotely should be the permanent standard and not solely a prophylactic measure during emergencies. The Legislature should mandate the use of call and video conferencing technology to give the public live access to public meetings without having to

attend them. On September 24, 2020, the Department of Community Affairs published “Emergency Remote Meeting Protocol for Local Public Bodies,” N.J.A.C. 5:39-1, *et seq.*, which requires public bodies to provide the public “with similar access to a remote public meeting as members of the local public body,” N.J.A.C. 4:39-14(c). However, these provisions only apply during a time of declared emergency. Public agencies should be required to give the public remote audio and video access when there is no emergency. Finally, to maximize access, meetings should be recorded electronically and permanently posted on public agencies’ websites. ☞

Endnotes

- Both the OPRA and OPMA amendments dashed through the Legislature in four days without any public hearings or public input from stakeholders.
- N.J.S.A. 47:1A-5(i)(2). The seven-business-day deadline is suspended during a state-wide state of emergency or state-wide public health emergency, or a state of local disaster emergency. *Id.*
- N.J.S.A. 26:13-26.
- Exec. Order 26 (McGreevey 2002).
- N.J.S.A. 47:1A-1.1.
- N.J.S.A. 47:1A-3(a).
- N.J.S.A. 47:1A-1.
- Exec. Order 9 (Hughes 1963).
- N.J.A. C. 8:36-15.3(a) & 8:36-23.15.
- An open issue is whether a record that relates to a public health emergency that is required to be made, maintained or kept on file by a law other than the EHPA would not be covered by the EHPA’s exemption.
- N.J.S.A. 47:1A-5(g).
- See nj.com/coronavirus/2020/05/requests-for-nj-public-records-rejected-during-coronavirus-crisis-as-murphy-uses-little-known-law.html (last visited May 29, 2020).
- N.J.S.A. 47:1A-5(i)(2).
- N.J.S.A. 47:1A-5(i)(1); N.J.S.A. 47:1A-7(b) & (e) (respectively).
- Legislation proposed this term would mandate that the GRC adjudicate “all disputes and complaints” in 150 calendar days. (S380).
- N.J.S.A. 10:4-9.3(a). The amendment’s language regarding what type of emergency triggers these provisions tracks the language in the OPRA amendment.
- N.J.S.A. 10:4-9(b).
- See njpublicnotices.com (last visited May 29, 2020).

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