

# Appellate courts of two minds about public records

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In separate rulings, one appellate court has improved New Jerseyans' ability to see public records, while another has made it harder.

In a Union County case, a three-judge appellate panel ruled the state Open Public Records Act does not require members of the public to use official forms when asking for records, as long as their requests are similarly clear and specific.

But in an East Orange dispute, another group of judges gave wide leeway to government officials in deciding which requests to accept. For example, while OPRA permits the public to submit requests "electronically," they ruled that does not mean the city clerk's office must accept faxes.

The disparate decisions, issued almost simultaneously on May 21, involve opinions promulgated by the state Government Records Council.

The state's revised OPRA law created the council in 2001 to educate the public and government officials about the law, and provide a forum to resolve disputes without going to court.

Under Gov. Jon Corzine, though, the GRC has encouraged tighter administrative controls over records. In 2006, the council reversed its earlier policy and issued an advisory opinion that the law requires requesters to use each agency's version of request forms.

Union County immediately adopted this advice as policy, saying it was "obligated to follow the regulations promulgated" by the GRC. When the county cited the new policy in rejecting an e-mail request for an ordinance from Tina Renna, head of the Union County Watchdog Association, she filed suit.

The GRC, represented by the state Attorney General's office, lined up on the other side.

Her case, brought by Montclair attorney Richard Gutman, cited OPRA's statement that a records request "shall be in writing." Renna argued the law does specify a particular form, much less the varied ones promulgated by different agencies in the wake of the GRC's change of heart. The county won at trial, but the appeals court has reversed.

In their ruling, Judges Philip S. Carchman, Rudy B. Coleman and Marie Simonelli cited the legislative history of the law. At that time, the state Attorney General's Office suggested agencies would be better able to keep track of written requests, and members of the public would have documentation if they did not receive answers within the required seven business days or less.

"We deem the legislative mandate for a form to be one of accommodation rather than restriction," said the ruling, written by Carchman. He noted other states have done away with requirements to use official forms, and some do not require anything in writing.

Aside from the GRC, the decision found that "no state has adopted a statute or procedure that limits access to records to a written request on an official form."

But the judges recognized the bureaucratic advantages of using official forms that briefly spell out what documents are being sought. Requesters "should" use official forms, or provide the same type of information, the judges said.

If their unofficial requests are unclear, records custodians may require them to be resubmitted on official forms, as long as this is not merely a dodge, the court ruled.

"This decision will mean easier access to public records," Gutman said. "That's what the Legislature intended when they wrote in OPRA's first sentence that public records should be 'readily accessible.'"

But the county challenged that conclusion in a statement issued by its public information office, noting it followed the GRC's lead on the issue. The procedure "worked well when used by thousands of people who received their requested public records," the statement noted.

One beneficiary of the court ruling, though, is John Paff of Franklin Township, head of the Libertarian Party's open government initiative in New Jersey.

"The ruling resolves a long-standing problem," he said.

Paff cited recent experience. On April 10, he asked for records from Woodbridge Fire District No. 2, using a standard state OPRA request form. On April 22, the district replied by directing him to re-submit the request on its own form.

The difference? The standard form has "transparent government is vital" in a box. The fire district's form replaces the slogan with a decorative Maltese cross. The GRC rejected Paff's requests to take up the issue.

But as the losing party in the East Orange case, Paff is concerned about the implications of that ruling.

In November 2007, he asked for city records, ignoring a statement on the clerk's form that the office would not accept faxes. In response, the clerk told him to re-submit the request in person or by mail.

Citing the law's provisions that requests can be "hand-delivered, mailed, transmitted electronically, or otherwise conveyed," Paff asked the GRC to tell East Orange to accept faxes.

But in March 2008, the GRC accepted the interpretation of its executive director, Catherine Starghill, that the law gives the clerk or other records custodian "discretion in developing processes to that he or she can best meet his or her obligation[s] under OPRA."

Paff sued, and again the GRC, represented by the Attorney General, joined the city to oppose him.

When OPRA was written, the theory behind the word "electronically" was that it would reflect current and future technology by including faxes, e-mails and any other system likely to be adopted. The idea was to make it easy for the public by allowing requesters to use any format generally used by a government agency.

But Starghill said some agencies might not have fax lines dedicated just to OPRA requests. The appellate judges agreed.

In a decision written by Skillman, they said that while the law allows the public to use various methods to ask for records, "it does not expressly require a public agency to accept... [a] request by any one of the methods."

"The clerk was simply operating within the discretion given to her by the Government Records Council in its interpretation of the statute," said Kevin D. Harris, the city's assistant corporation council, who wrote the brief.

"The two questions were, is the clerk entitled to number one, establish a form for requests, and number two, establish the manner in which they can be delivered?" Harris said.

Harris noted this could play out differently around the state, depending on forms and procedures adopted by various agencies.

"The clerk could decide not to accept written or hand-in requests, but only to accept faxes," he said.

In the decision, Skillman noted East Orange's policy "allows submission by mail or 'electronically.'" It concluded the elimination of faxes from the broad category of "electronically" would not impose an undue burden on the public.

The decision as to whether East Orange will allow any form of electronic request may require further discussion, Harris said. But for now, the city continues to accept mailed or in-person requests for access to records, he said.

Paff said he is concerned that such limits will become commonplace,

"I think it's probable that custodians, after reading this decision, will adopt policies that specify mail or personal delivery," Paff said, adding he has not decided whether to appeal.

For his part, Skillman wrote that even if the judges had any doubt, "we would defer to the GRC's interpretation."

Harris said the city is also prepared to follow the GRC's lead, even if it reverts to its old interpretation of the law.

"If they change it back... we'll make whatever adjustments are necessary," he said.