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OPRA Request Need Not Be on Form Prescribed by Agency, Court Holds

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The Appellate Division handed open government advocates a victory and a defeat on Thursday: one panel saying requests under the Open Public Records Act need only be in writing, not necessarily on an agency form; another panel saying an agency need not accept OPRA requests by every electronic means.

The bottom line: an e-mailed request was OK, a fax was not. Taken together, the rulings suggest that appeals courts are attempting to be even-handed in carrying out OPRA's ameliorative purpose — by not imposing arbitrary strictures on requesters but also by recognizing the burdens that public agencies face in complying.

In *Renna v. Union County*, A-0821-07, Appellate Division Judges Philip Carchman, Rudy Coleman and Marie Simonelli said that while OPRA requires that requests be in written form, a specific form should not be a requirement.

Carchman wrote for the panel, "We deem the legislative mandate for a form to be one of accommodation rather than restrictive. To suggest otherwise would create a circumstance that runs counter to both the language used and the policy enunciated by the Legislature in its enactment of OPRA. ... [S]uch rigid interpretation contradicts the spirit and intent of the underlying statute."

Tina Renna, president of the Union County Watchdog Association, e-mailed a request for a copy of a Union County Board of Freeholders resolution, which the county clerk rejected because it was not on a prescribed form. County Counsel Robert Barry argued that the county should be allowed to require use of the form because it streamlined the procedure and was more efficient.

Carchman said that the panel understood the county's rationale for requiring a specific form but "these legitimate policy concerns must cede to the broader policy of governmental transparency and the rights of citizens to have open and virtually unfettered access to government records."

Carchman noted that no state with a similar public-document-access statute requires requesters to use a specific form and that many other states have completely eliminated the requirement that requests for records be in writing.

Renna's lawyer, Montclair solo Richard Gutman, says the ruling "is going to make it easier to get access to public records. E-mail is cheaper and faster than using an official form."

Gutman also represents the New Jersey Foundation for Open Government, a nonpartisan organization that monitors OPRA enforcement.

Barry says he cannot comment on the ruling because he has not had a chance to speak to county officials.

Don't Give Us the Fax

In *Paff v. East Orange*, A-4280-07, the court assented to the East Orange city clerk's policy of not accepted OPRA requests via fax, finding that the statute does not expressly state that an agency must accept requests by every form of electronic transmission.

OPRA says: "A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian."

Open government advocate John Paff read that language to mean that any of those forms of communication are compliant with the statute. The Government Records Council, the agency charged with enforcing OPRA, disagreed.

Appellate Division Judges Stephen Skillman, Jane Grall and Marianne Espinosa said the Legislature gave the GRC authority to interpret OPRA, and the GRC's reading was not irrational.

"When the Legislature delegates authority to a state agency to administer and interpret a statute, our courts will defer to that agency's interpretation of the statute 'provided it is not plainly unreasonable,'" Skillman said.

"In the exercise of this authority, the GRC has notified custodians of government records that they may prohibit persons from submitting requests for government records by fax," he said.

Paff's attorney, Walter Luers, says he is disappointed. "I'm concerned that citizens will be limited in how they make OPRA requests to public agencies," says the Oxford solo. "To me it's clear in the law that all OPRA requests should be accepted as long as they are in writing." Renna's lawyer Gutman says the statute appears to require agencies to accept electronically transmitted requests regardless of the means, not allowing them to pick and choose.

Luers and Paff are mulling whether to appeal to the Supreme Court. East Orange Corporate Counsel Jason Holt did not return a telephone call seeking comment.

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