

EXECUTIVE SUMMARY

AN ANALYSIS OF NEW JERSEY'S OPEN PUBLIC RECORDS ACT AND GOVERNMENT RECORDS COUNCIL

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Introduction

In commissioning this study, the New Jersey Foundation for Open Government (NJFOG) sought an independent “best practices” analysis of New Jersey’s Open Public Records Act (OPRA) and its Government Records Council (GRC). To accomplish this, the study looks primarily at the Freedom of Information (FOI) regimes in the states of New York and Connecticut, the national government of Canada, and the Canadian Province of Ontario, and to a lesser degree, at the FOI regimes in a number of other jurisdictions, including Alberta, British Columbia, Florida, Indiana, Manitoba, Mexico, New Brunswick, Nova Scotia, Saskatchewan and Virginia. The analysis focuses on specific provisions of OPRA and addresses the operational, policy and legal provisions that would improve the GRC in terms of its structure, staffing, funding, relationship to, and with, other government entities, mission, and application of the law.

The study reaches two fundamental conclusions:

1. OPRA is in need of fundamental repair to its substantive provisions if it is to deliver on its promise of leading New Jersey into a new age of open and accountable government.
2. The concept of a GRC is an excellent construct to administer and enforce New Jersey’s FOI laws, but it too requires significant alterations to its structure and operations if it is to succeed in that lofty endeavor.

The study makes a number of concrete recommendations. Some of these can be accomplished internally by the GRC and therefore relatively quickly. Others require legislation and consequently will take more time. The study also describes a series of formal and informal steps necessary to end the culture of secrecy inherent in virtually every government institution, including those of New Jersey.

Recommendations Requiring Internal Action by the GRC

1. The GRC should formally adopt and publish a mission statement after input from the public.
2. The GRC, with input from the public, should set and publish specific measurable goals and objectives in fulfilling its stated mission. These goals and objectives should be challenging, but achievable within the GRC's current resources.
3. The GRC should compile and publish all non-legislative policies affecting access to public records in a single document readily available to the public. Any policy not published in that document should not be considered or used by the GRC as precedent against any requester or party to its proceedings.

If the GRC fails to take action with respect to any of these recommendations, legislation should be introduced to effectuate them.

Recommendations Requiring Legislation

1. Exemptions, exceptions and exclusions to, and within OPRA, should be limited strictly to those required by: (a) federal law that supersedes state law under the Supremacy Clause of the U.S. Constitution; (b) the state constitution; and (c) other state statutes. In addition, the legislative and judicial branches should be subject to OPRA and included within the oversight of the GRC.
2. OPRA should be amended to cover the deliberative and meeting processes within government, as well as access to its records.
3. OPRA should be amended to explicitly provide that the GRC independently engage in five operational areas: training and education, legislation, administrative adjudication, litigation and internal administration.
4. OPRA should be amended to provide explicitly that the GRC be an independent office within the executive branch of state government.
5. To better assure the GRC's independence, OPRA should be amended to provide that three of OPRA's five members shall be nominated by the Governor, including one (the chairperson) from a list of nominees proposed by a not-for-profit organization agreeable to both major parties in the legislature, having as its principal

purpose transparency and accountability in government; one member each shall be nominated by the highest ranking leader of each House of the Legislature who is not a member of the same political party as that of the Governor. In addition, GRC members should serve for four-year staggered terms with no more than two members from the same political party. GRC members should not receive a salary as such, but rather a reasonable per diem allowance and the reimbursement of actual necessary expenses.

6. In order for the GRC to perform effectively in the five operational areas herein recommended, its staffing level should be increased to a minimum 30 equivalent full-time positions. This proposal would also provide the necessary resources to administer and enforce an open government meetings law, as previously recommended.

7. To adequately fund the GRC at the staffing level recommended, an annual appropriation of approximately \$3,000,000 (.00008 of New Jersey's fiscal year 2007 budget) would not be unreasonable.

8. OPRA should be amended to explicitly set forth a statement concerning its construction and application, such as "The general rule under OPRA is disclosure, and any exception to that rule shall be narrowly construed in light of the general policy of openness expressed in the act. The burden of proving the applicability of an exception to disclosure under the act rests upon the party claiming it."

Final Comments

Information by its very nature is value neutral. It can be used properly or improperly. It can be helpful to some and detrimental to others. What is clear, however, is that information is a source of power and, as such, officials and bureaucracies have always attempted to maintain exclusive control over the information they possess. Thus, governments almost innately adopt a culture of secrecy, and New Jersey is no exception.

A culture of secrecy can be transformed into a culture of openness only if there is a genuine and enforced commitment from above. There must be a real commitment to, and aggressive enforcement of, open government rules and policies by those who control the institutions of government. The question then becomes how to accomplish this. The answer lies in a combination of formal and informal accountabilities from top to bottom.

First, the Governor must make clear to agency heads that they are expected to ensure that a culture of maximum openness and transparency is maintained within their respective agencies, and that each agency head will be held accountable for effective implementation of the rules and policies governing openness and transparency. The Governor also should insist that statistics be published to support this accountability.

Second, government employees and contractors must be thoroughly trained in the rules dealing with transparency and public accessibility. Their leaders must establish and enforce clear policies in this regard. But most important, such employees and contractors

must know and expect that they'll be evaluated, retained, promoted or disciplined based on their implementation of the rules and policies requiring or favoring openness.

Third, the Legislature, as part of the confirmation process of high government officials, should thoroughly vet all nominees for their commitment to openness and transparency. Only nominees who evidence a strong commitment to establishing and maintaining a culture of openness and transparency should be confirmed.

Finally, it is the responsibility of civil society, and ultimately the citizens of New Jersey, to insist that there is a genuine and meaningful commitment to openness and transparency by their public servants. If that commitment is not met, and the culture of secrecy within government is not changed to one of greater openness and transparency, then the electoral process provides the appropriate means to achieve that goal.