

Environmental Law & Litigation

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Controversial OPRA Amendment Has Potentially Significant Implications for New Jersey Environmental Professionals

By [Mark S. Heinzelmann](#)

On June 5, New Jersey Gov. Phil Murphy signed long-contested legislation, [S2930](#) (2024 OPRA Amendment), amending the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1, et seq. As most New Jersey environmental practitioners know, OPRA is the corollary to the federal Freedom of Information Act. Among other things, it permits the public, media, and professionals to submit so-called “OPRA requests” to governmental entities to gain access to nonconfidential public records. Following receipt of an OPRA request, the receiving governmental entity typically conducts a search for responsive records, culls any confidential, nonpublic information using a set of exceptions that are baked into OPRA, and either (1) provides the nonconfidential responsive records to the requestor (typically at a cost) or (2) makes the records available for copying. OPRA—originally enacted in 2002—has long been a staple for environmental professionals. It is an effective (though at times not efficient) manner of securing information on past and ongoing remediation at New Jersey contaminated sites. It also can be (and has been) used by attorneys and other interested parties to gain access to certain NJDEP legal information, such as nonconfidential settlement agreements, final agency decisions, and enforcement documents. With the passage of the 2024 OPRA Amendment, accessing such documents may become more difficult.

In an effort to stem an apparently overwhelming number of OPRA requests from “data brokers”¹ seeking public information to sell for profit, i.e., for a “commercial purpose”;² to reduce record custodian backlogs; and to better protect confidential personal identifiers, such as Social Security numbers, the 2024 OPRA Amendment makes a number of fundamental changes to OPRA, including the following:

1. It creates a “rebuttable presumption” that the fees charged for an OPRA request are reasonable, thus putting the onus on the requestor to show that the governmental entity is charging excessive fees.
2. It alters the fee-shifting provision for challenges to OPRA request responses by only requiring an award of attorney’s fees where “the public agency has been determined to have unreasonably denied access, acted in bad faith, or knowingly or willfully violated [OPRA].” In all other instances, an award of attorney’s fees following a successful challenge is only discretionary.
3. It allows a records custodian to refuse to respond to a request for letters, emails, text messages, or other correspondence or social media postings if the requestor does not provide a job title or account to be searched, a specific subject matter, and a time frame in which the documents were generated.
4. It permits governmental entities to file litigation against requestors for seeking records with “the intent to substantially impair the performance of government function.” That broad standard is undefined.
5. It prohibits requestors from filing the same OPRA request with multiple custodians within the same state agency and allows a governmental entity to deny an OPRA request on those grounds.
6. It prohibits a party to a legal proceeding from filing an OPRA request if the records sought are the subject of a court order or pending discovery request. It also requires requestors to certify whether an OPRA request is being made in connection with a legal proceeding.

These provisions are widely seen as restricting access to public records and chilling the OPRA process.³ That said, the 2024 OPRA Amendment also includes provisions designed to expand access. Among other things, it appropriates \$10 million for the purpose of making nonconfidential public records accessible via an online database. The obvious goal of that provision is to obviate most OPRA requests in the first place. We will see how quick and efficient the government is in populating the database. If history is any indication, the practical outcome may differ significantly from the goal.

Though the policy goals of limiting access to personal information for commercial purposes and reducing OPRA backlogs are laudable, the 2024 OPRA Amendment is likely to have a significant impact on environmental professionals operating in New Jersey. Among other things, it may (1) limit the ability of licensed site remediation professionals and consultants to collect information for various elements of the remediation process, including preliminary assessments; (2) chill due diligence efforts, which may—in turn—impact the ability of buyers and lenders to secure innocent purchaser protections and consummate transactions; and (3) blunt the impact of OPRA's fee-shifting provision and thereby reduce the incentive for governmental entities to respond to legitimate OPRA requests.

To his credit, Murphy acknowledged the vociferous criticism of the 2024 OPRA Amendment in his [Statement Upon Signing Senate Bill No. S2930](#), but he expressed his opinion that the bill will ultimately improve the OPRA process and accessibility. Time will tell. For now, environmental professionals seeking access to government documents must closely examine each OPRA request to ensure, among other things, that it (1) is not duplicative; (2) is sufficiently detailed; and (3) is, where necessary, narrowly tailored. In order to allow time for an anticipated increase in legal and administrative challenges, practitioners should also file their OPRA requests well in advance of any potential deadlines.

If you have any questions about OPRA, the 2024 OPRA Amendment, or access to public records, please contact the author of this article.

¹ The 2024 OPRA Amendment defines "data broker" as "a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship."

² The 2024 OPRA Amendment defines "commercial purpose" as "the direct or indirect use of any part of a government record for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee." It also includes a number of exceptions.

³ See <https://newjerseymonitor.com/2024/06/05/gov-murphy-signs-bill-revamping-public-records-law-in-blow-to-transparency-advocates/>.

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