

OPRA Forms and Indictable Offense Certifications

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Municipal Clerks often receive OPRA requests where the requester either fails to complete the indictable offense certification or omits it entirely. The GRC model request form includes this certification, and many municipalities include it on their own forms since a victim's personal information cannot be released to the victim's aggressor. Despite this, Clerks cannot condition disclosure of personal information on the requester's completion of an indictable offense certification, and if a requester certifies a conviction, Clerks cannot require the requester to provide additional information. This leaves Clerks on their own to find the relevant criminal background information and to withhold or redact records accordingly, which presents an unreasonable burden to the Clerk's time and to the municipality's resources.

Applications of this rule sometimes go against our common sense. For example, when a prison inmate listed the prison as his contact address on an OPRA request seeking personal information, the GRC determined the custodian unlawfully denied access by asking the requester to complete the indictable offense certification and to provide relevant criminal background information. In its decision, the GRC appeared to endorse the position that Clerks must perform an independent investigation into a requester's criminal background and rely on sources such as newspapers when a requester refuses to provide the information voluntarily. In addition to being an inefficient use of resources, placing this responsibility on Clerks and other records custodians is an enormous burden, and we should hope the next OPRA amendment corrects this problem.

Part of this dissonance comes from the state of the current law, which requires agencies to maintain official request forms while not requiring requester to use them. Likewise, although the GRC's model form has an indictable offense certification, this certification is not required for a written communication to constitute a valid OPRA request. Municipalities should nevertheless make their official request forms easily accessible online so the convenience of using them encourages requesters to supply all the information a custodian needs to comply with OPRA. Making forms readily available online also advances OPRA's stated goal of increasing government transparency, since a user-friendly process for requesting records means fewer barriers to access.

Anonymous requests present additional complications since victim information **cannot** be provided to anonymous requesters. Still, the Appellate Division opined that records cannot be withheld based on "the remote possibility that the anonymous requester had been convicted of an indictable offense, or that the information sought would be personal information about the requester's victim or family." See *Scheeler v. Office of the Governor*, 448 N.J. Super. 333, 341 (App. Div. 2017). Instead, courts seem willing to accept the following compromise: When a requester is anonymous, a Clerk can redact personal information that is not otherwise protected by the confidentiality provisions of the OPRA statute. This enhanced redaction provides a "middle ground" between full disclosure and withholding records in their entirety, but custodians should consult their attorneys before applying any enhanced redactions.

Yet another complication is the rise of online services like OPRAmachine that provide a user interface for making OPRA requests. The complication presents when these services automatically publish responsive records to the world, thereby altering the privacy analysis courts and custodians have typically employed across the spectrum of OPRA requests. There is a trial-level action pending regarding the validity of requests made through these online publishing services, but there is not yet a decision, let alone an appellate decision, so requests for personal information made through these online services must be analyzed on a case-by-case basis. As with all the other complicated scenarios described above where there is no clearly controlling law, Clerks and other record custodians should reach out to their counsel as soon as possible, not only for guidance, but to help share the burden of dealing with these difficult matters and to help avoid costly litigation, which is an ever-present threat due to OPRA's attorney fee-shifting provisions.

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