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Michael L. Ticktin, esq.  
Chief, Legislative Analysis  
Department of Community Affairs  
P.O. Box802  
Trenton, NJ08625-0802  
609-633-6729 (fax)

Re: PRN2010-266, N.J.A.C. 5:3

Dear Mr. Ticktin:

I am an attorney concentrating in Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -11, litigation. Thank you for this opportunity to comment on the proposed Department of Community Affairs rule N.J.A.C. 5-3, PRN2010-266, that creates OPRA procedures and exempts certain records from access under OPRA. The following are my comments on specific proposed rules:

## PROCEDURAL PROVISIONS

### Certification of Non-Conviction

Proposed Rule 5:3-1.3(c)(10) requires that the Department's request form include a certification that the record requester has not been convicted of an indictable offense. This purpose of this provision presumably is to ensure compliance with Section 2.2 of the OPRA, which forbids felons from obtaining personal information about their victims.

Yet, OPRA does not include such a certification from its detailed description of the contents of the official request forms. N.J.S.A. 47:1A-5(f). That is no accident. A certification as the Department proposes will create the erroneous impression that convicted felons are disqualified from obtaining any government records. At the very least, the certification should clearly state that convicted felons are forbidden from obtaining only those government records containing personal information regarding their victims. A better solution would be to not ask the requestor about his or her criminal record unless and until he

or she requests personal information about another individual.

Moreover, there is no justification for this requirement if the Department maintains its proposed prohibition on disclosing “personal contact information” to anyone, whether a convicted felon or not. Proposed Rule 5:3-2.2(8)(ii).

### Requestor’s Identity

Proposed Rule 5:3-1.4(c) expressly authorizes the custodian to require the requestor to provide additional information “to ascertain the requestor’s identity and status to determine whether access is authorized.” However, the requestor’s identity, status and purpose are generally irrelevant to statutory requests for public records. *Keddie v. Rutgers, State University*, 148 N.J. 36, 44 (1997). If a record is an OPRA public record, it should be available to anyone for any reason (other than a felon’s request for personal information about his victim). Therefore, the retention of the proposed language will likely result in unnecessary delay, or unlawful denial, of access to public records.

### Copying Costs

Proposed Rule 5:3-1.4(e) correctly states that copying costs shall not exceed actual costs but omits any reference to the substance of the recent amendment of N.J.S.A. 47:1A-5(b) that limits copying costs to \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger.

### Deadline for Agency’s Response

Under proposed Rule 5:3-1.10(b), the seven-day-deadline for agency response does not begin to run until the record requestor “pre-pays the fees.” This rule would violate the OPRA requirement that all records, other than those requiring immediate access, access shall be granted or denied “as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived” (emphasis added). N.J.S.A. 47:1A-5(i). “Receiving the request” occurs at the beginning of the request process. “Pre-pays the fees” occurs near the end of the request period. The record custodian would not know what the copying fees are until the custodian knows how many pages are going to be released.

The proposed rule would produce the absurd result that a custodian could simply ignore an OPRA request without the requestor having any right to sue because that right to sue does not exist until either the custodian

expressly denies access or takes more than seven days to respond. Under the proposed rule, because the copying costs would not have been paid, the seven days would not have begun to run. By not beginning the seven-day period until the request has been largely processed, this proposed rule violates OPRA's requirement of a prompt, seven-day-maximum response to record requests.

The origin of this proposed provision may be a misunderstanding of what OPRA requires within seven days. OPRA requires a custodian to "grant access to a government record or deny a request for access to a government record." N.J.S.A. 47:1A-5(i). In other words, the custodian must state whether or not the custodian will grant access. The custodian could respond within that time period stating that the requestor can have access as soon as the custodian pays a specific copying fee. Thus, there is no need to delay the start of the seven day period until the requestor prepays the fee.

## SUBSTANTIVE PROVISIONS

### Building Plans

OPRA already exempts "emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1. Moreover, Executive Order 21 (McGreevey) exempts any government record whose disclosure would materially increase the risk or consequences of sabotage or terrorism. There is no justification for a broad exemption for all building plans submitted with permit applications.

### Personal Contact Information

OPRA exempts social security numbers, credit card numbers, unlisted telephone numbers and driver license numbers. N.J.S.A. 47:1A-1.1. Governor McGreevey's 2002 Executive Order 21 exempted from OPRA an individual's "home address and home telephone number." In response to a public outcry, Governor McGreevey rescinded that exemption when he issued Executive Order 26. Now, the Department proposes to reinstate those exemptions for home addresses and home telephone number, add an exemption for e-mail addresses and add a generic exemption for all "other personal contact information."

There is no adequate justification for exempting all personal contact information. There is no reasonable expectation of privacy as to home addresses, listed home telephone numbers and email addresses. If there were a reasonable expectation of privacy, the Department would have no need to exempt them because

records invoking a reasonable expectation of privacy are already exempt under OPRA. N.J.S.A. 47:1A-1. The public generally has a right to know the identities of the persons with whom public officials are communicating as part of their official duties. Often a record will display personal contact information without the name. Thus, the individual interacting with the government cannot be identified without the personal contact information.

Very truly yours,

Richard M. Gutman