

# ASSEMBLY, No. 4435

## STATE OF NEW JERSEY 216th LEGISLATURE

INTRODUCED MAY 11, 2015

**Sponsored by:**

**Assemblyman JOHN J. BURZICHELLI**  
**District 3 (Cumberland, Gloucester and Salem)**  
**Assemblyman JOHN DIMAIO**  
**District 23 (Hunterdon, Somerset and Warren)**  
**Assemblyman JAY WEBBER**  
**District 26 (Essex, Morris and Passaic)**

**SYNOPSIS**

Requires non-binding mediation for disputes regarding access to public records.

**CURRENT VERSION OF TEXT**

As introduced.



(Sponsorship Updated As Of: 11/17/2015)

A4435 BURZICHELLI, DIMAIO

2

1 AN ACT concerning mediation for disputes over public records and  
2 amending P.L.2001, c.404.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6

7 1. Section 7 of P.L.2001, c.404 (C.47:1A-6) is amended to read  
8 as follows:

9 7. A person who is denied access to a government record by  
10 the custodian of the record **【,at the option of】** shall have the right to  
11 file a complaint with the Government Records Council, established  
12 pursuant to section 8 of P.L.2001, c.404 (C.47:1A-7), and the  
13 Government Records Council shall refer the matter to mandatory  
14 non-binding mediation to facilitate the resolution of the dispute  
15 regarding access to government records, with a neutral trained  
16 mediator, selected by the council, who encourages and facilitates  
17 the resolution of the dispute. Mediation shall be a confidential,  
18 nonadversarial process having the objective of helping the parties  
19 reach a mutually acceptable, voluntary agreement. The mediator  
20 shall assist the parties in identifying issues, foster joint problem  
21 solving, and explore settlement alternatives.

22 If mediation does not resolve the dispute, the Government  
23 Records Council shall receive, investigate, hear, review and  
24 adjudicate the dispute, pursuant to section 8 of P.L.2001, c.404  
25 (C.47:1A-7), and shall issue an advisory opinion in the matter as to  
26 whether the particular type of record is a government record which  
27 is accessible to the public.

28 Thereafter, the requestor **【,may】** ,upon serving the custodian of  
29 the requested record notice of the intent to institute a proceeding  
30 regarding access to a government record,shall have the right to:

31 institute a proceeding to challenge the custodian's decision to  
32 deny access to the requested record by filing an action in Superior  
33 Court **【which】** after the expiration of five days from the service of  
34 such notice of intent. The matter shall be heard in the vicinage  
35 where it is filed by a Superior Court Judge who has been designated  
36 to hear such cases because of that judge's knowledge and expertise  
37 in matters relating to access to government records**【; or**

38 in lieu of filing an action in Superior Court, file a complaint with  
39 the Government Records Council established pursuant to section 8  
40 of P.L.2001, c.404 (C.47:1A-7)**【.**

41 The right to institute any proceeding under this section shall be  
42 solely that of the requestor. Any such proceeding shall proceed in a  
43 summary or expedited manner. The public agency shall have the  
44 burden of proving that the denial of access is authorized by law. If  
45 it is determined that access has been improperly denied, the court or

**EXPLANATION – Matter enclosed in bold-faced brackets **【thus】** in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**

1 agency head shall order that access be allowed. A requestor who  
2 prevails in any proceeding shall be entitled to a reasonable  
3 attorney's fee in the event the Government Records Council opinion  
4 determined that the government record had been improperly denied.  
5 (cf: P.L.2001, c.404, s.7)

6  
7 2. Section 8 of P.L.2001, c.404 (C.47:1A-7) is amended to read  
8 as follows:

9 8. a. There is established in the Department of Community  
10 Affairs a Government Records Council. The council shall consist  
11 of the Commissioner of Community Affairs or the commissioner's  
12 designee, the Commissioner of Education or the commissioner's  
13 designee, and three public members appointed by the Governor,  
14 with the advice and consent of the Senate, not more than two of  
15 whom shall be of the same political party. The three public  
16 members shall serve during the term of the Governor making the  
17 appointment and until the appointment of a successor. A public  
18 member shall not hold any other State or local elected or appointed  
19 office or employment while serving as a member of the council. A  
20 public member shall not receive a salary for service on the council  
21 but shall be reimbursed for reasonable and necessary expenses  
22 associated with serving on the council and may receive such per  
23 diem payment as may be provided in the annual appropriations act.  
24 A member may be removed by the Governor for cause. Vacancies  
25 among the public members shall be filled in the same manner in  
26 which the original appointment was made. The members of the  
27 council shall choose one of the public members to serve as the  
28 council's chair. The council may employ an executive director and  
29 such professional and clerical staff as it deems necessary and may  
30 call upon the Department of Community Affairs for such assistance  
31 as it deems necessary and may be available to it.

32 b. The Government Records Council shall:

33 establish **【an informal】** a mandatory non-binding mediation  
34 program to facilitate the resolution of disputes regarding access to  
35 government records, for which the council may use the Dispute  
36 Settlement Office, in the Office of the Public Defender, to mediate  
37 such disputes;

38 receive, hear, review and adjudicate a complaint filed by any  
39 person concerning a denial of access to a government record by a  
40 records custodian;

41 issue advisory opinions, on its own initiative, as to whether a  
42 particular type of record is a government record which is accessible  
43 to the public;

44 prepare guidelines and an informational pamphlet for use by  
45 records custodians in complying with the law governing access to  
46 public records;

47 prepare an informational pamphlet explaining the public's right  
48 of access to government records and the methods for resolving

1 disputes regarding access, which records custodians shall make  
2 available to persons requesting access to a government record;  
3 prepare lists for use by records custodians of the types of records  
4 in the possession of public agencies which are government records;  
5 make training opportunities available for records custodians and  
6 other public officers and employees which explain the law  
7 governing access to public records; and  
8 operate an informational website and a toll-free helpline staffed  
9 by knowledgeable employees of the council during regular business  
10 hours which shall enable any person, including records custodians,  
11 to call for information regarding the law governing access to public  
12 records and allow any person to **request mediation or to** file a  
13 complaint with the council when access has been denied;  
14 In implementing the provisions of **subsections d. and**  
15 **subsection e.** of this section, the council shall: act, to the maximum  
16 extent possible, at the convenience of the parties; utilize  
17 teleconferencing, faxing of documents, e-mail and similar forms of  
18 modern communication; and when in-person meetings are  
19 necessary, send representatives to meet with the parties at a location  
20 convenient to the parties.  
21 c. At the request of the council, a public agency shall produce  
22 documents and ensure the attendance of witnesses with respect to  
23 the council's investigation of any complaint or the holding of any  
24 hearing.  
25 d. **Upon receipt of a written complaint signed by any person**  
26 **alleging that a custodian of a government record has improperly**  
27 **denied that person access to a government record, the council shall**  
28 **offer the parties the opportunity to resolve the dispute through**  
29 **mediation. Mediation shall enable a person who has been denied**  
30 **access to a government record and the custodian who denied or**  
31 **failed to provide access thereto to attempt to mediate the dispute**  
32 **through a process whereby a neutral mediator, who shall be trained**  
33 **in mediation selected by the council, acts to encourage and facilitate**  
34 **the resolution of the dispute. Mediation shall be an informal,**  
35 **nonadversarial process having the objective of helping the parties**  
36 **reach a mutually acceptable, voluntary agreement. The mediator**  
37 **shall assist the parties in identifying issues, foster joint problem**  
38 **solving, and explore settlement alternatives.** (Deleted by  
39 amendment, P.L. , c. (pending before the Legislature as this bill)  
40 e. If **any party declines mediation or if** mediation fails to  
41 resolve the matter to the satisfaction of all parties, the council shall  
42 initiate an investigation concerning the facts and circumstances set  
43 forth in the complaint. The council shall make a determination as  
44 to whether the complaint is within its jurisdiction or frivolous or  
45 without any reasonable factual basis. If the council shall conclude  
46 that the complaint is outside its jurisdiction, frivolous or without  
47 factual basis, it shall reduce that conclusion to writing and transmit

1 a copy thereof to the complainant and to the records custodian  
2 against whom the complaint was filed. Otherwise, the council shall  
3 notify the records custodian against whom the complaint was filed  
4 of the nature of the complaint and the facts and circumstances set  
5 forth therein. The custodian shall have the opportunity to present  
6 the board with any statement or information concerning the  
7 complaint which the custodian wishes. If the council is able to  
8 make a determination as to a record's accessibility based upon the  
9 complaint and the custodian's response thereto, it shall reduce that  
10 conclusion to writing and transmit a copy thereof to the  
11 complainant and to the records custodian against whom the  
12 complaint was filed. If the council is unable to make a  
13 determination as to a record's accessibility based upon the  
14 complaint and the custodian's response thereto, the council shall  
15 conduct a hearing on the matter in conformity with the rules and  
16 regulations provided for hearings by a State agency in contested  
17 cases under the "Administrative Procedure Act," P.L.1968, c.410  
18 (C.52:14B-1 et seq.), insofar as they may be applicable and  
19 practicable. The council shall, by a majority vote of its members,  
20 render a decision as to whether the record which is the subject of  
21 the complaint is a government record which must be made available  
22 for public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as  
23 amended and supplemented. If the council determines, by a  
24 majority vote of its members, that a custodian has knowingly and  
25 willfully violated P.L.1963, c.73 (C.47:1A-1 et seq.), as amended  
26 and supplemented, and is found to have unreasonably denied access  
27 under the totality of the circumstances, the council may impose the  
28 penalties provided for in section 12 of P.L.2001, c.404 (C.47:1A-  
29 11). A decision of the council may be appealed to the Appellate  
30 Division of the Superior Court. **【A decision of the council shall not  
31 have value as a precedent for any case initiated in Superior Court  
32 pursuant to section 7 of P.L.2001, c.404 (C.47:1A-6).】** All  
33 proceedings of the council pursuant to this subsection shall be  
34 conducted as expeditiously as possible.

35 f. The council shall not charge any party a fee in regard to  
36 actions filed with the council. The council shall be subject to the  
37 provisions of the "Open Public Meetings Act," P.L.1975, c.231  
38 (C.10:4-6), except that the council may go into closed session  
39 during that portion of any proceeding during which the contents of a  
40 contested record would be disclosed. A requestor who prevails in  
41 any proceeding shall be entitled to a reasonable attorney's fee in the  
42 event the Government Records Council opinion determined that the  
43 government record had been improperly denied.

44 g. The council shall not have jurisdiction over the Judicial or  
45 Legislative Branches of State Government or any agency, officer, or  
46 employee of those branches.

47 (cf: P.L.2001, c.404, s.8)

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1       3. This act shall take effect immediately.

2    STATEMENT

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4       This bill would establish mandatory non-binding mediation for  
5 any dispute regarding access to a government record. Under this  
6 bill, the Government Records Council may, but is not required, to  
7 use the Dispute Settlement Office, within the Office of the Public  
8 Defender, to mediate any dispute regarding access to a government  
9 record. If mediation fails, the Government Records Council shall  
10 investigate the complaint, hold a hearing and adjudicate the claim  
11 for access to the records, which shall include the issuance of an  
12 advisory opinion as to whether the record sought is a government  
13 record which is accessible to the public.

14       After adjudication by the council, a person seeking access to a  
15 government record shall have the right to institute a proceeding in  
16 Superior Court. If the person seeking a government record prevails  
17 in a council or court proceeding, the person shall be entitled to a  
18 reasonable attorney's fee, if the council opinion determined that the  
19 government record had been improperly denied.

20       Under current law, a person who is denied access to a  
21 government record may either institute a proceeding in Superior  
22 Court to challenge the custodian's decision, or a person may file a  
23 complaint with the Government Records Council. Presently, if a  
24 person elects to file a complaint with the council, a person has the  
25 option of participating in mediation, but is not required to  
26 participate in mediation.

27       According to statistics of the Government Records Council, more  
28 than half of all mediated disputes concerning public records are  
29 resolved by mediation, but only approximately 20 percent of all  
30 record complaints are referred to mediation. Therefore, the  
31 mediation program established in this bill could potentially resolve  
32 many more disputes over access to government records.