Major Changes to Open Public Records Act: What Real Estate Professionals Need to Know

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As a result of recent changes concerning requirements that public bodies must adhere to in responding to Open Public Records Act (OPRA) requests, parties seeking to access information regarding matters pertaining to real property will see changes in the manner in which requests for information are processed. They will need to adjust their expectations with respect to the accessing of vital property information.

Practitioners in the real estate transaction, land use, and environmental law areas often rely on OPRA requests when engaging in diligence activities for clients seeking to acquire, lease, finance, or develop real property. The information obtained through OPRA requests provides a bird's eye view of the status of a property. It can potentially save a client money and time, depending on what is discovered during this process. Prior to the recent changes to the OPRA law signed by Governor Murphy earlier this month, a public entity had a strict timetable to respond to and limited leeway in denying requests for government records. Therefore, vast amounts of information contained in government records were usually readily available within about a week. Now, with the following specific changes directly relevant to the real estate industry, it is likely that the process will be different going forward.

First, there is no longer automatic fee shifting for attorney fees when a requestor wins litigating an improper denial. This will likely mean less incentive for public bodies to make sure they only deny a request when they absolutely must. That could mean more denials for routine requests when the requests are not well-crafted and thus leave room for interpretation by the recipient of the OPRA request.

Second, the time to reply to a request has been extended from seven days to up to two weeks if redactions are required or three weeks if the records are in storage. As we know, in the real estate world, deals are frequently entered into quickly with an eye towards an expedited due diligence period and a closing to follow soon thereafter. Thus, any delay in an OPRA response can make a big difference when trying to close a deal.

Third, the fees that record custodians may charge could increase for the release of records. Previously, entities rarely charged for documents produced in response to most OPRA requests. However, that may no longer be the case.

Fourth, requestors will be expected to file separate requests with different records' custodians in the same government agency, depending on the type of information sought. This is likely to complicate and delay the process for requestors to gain access to records they previously would have requested pursuant to one OPRA request.

Finally, the public entity may direct requestors to their websites or other electronic portals, putting the burden on the requester to sift through available online records first. If requestors are unable to find what they are looking for and require the public entities' assistance, public entities will be allowed to charge them double the standard fee for the additional work that comes along with the service.

It is still unclear how public bodies will respond to these recent changes in the law and the degree to which the changes will affect the manner and timeframe in which public bodies process and respond to OPRA requests. But it seems clear that requests will likely take longer, be more susceptible to denials, and result in additional expense to the party seeking access to public records.

Porzio's team of real estate attorneys are here to provide guidance and information ensuring compliance with the new changes to OPRA, including effectively drafting requests, and negotiating with public agencies to ensure an expedited process, avoid being improperly denied, and to minimize diligence costs associated with government records. Contact the author(s) or your Porzio attorney for more information.