



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**October 26, 2010 Government Records Council Meeting**

Joseph S. Oswald  
Complainant

Complaint No. 2009-305

v.

New Jersey Motor Vehicle Commissions  
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Custodian certified that there are no records responsive to the Complainant’s request, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. *See also* Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of October, 2010

Robin Berg Tabakin, Chair  
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: November 1, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 26, 2010 Council Meeting**

**Joseph S. Oswald<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-305**

v.

**New Jersey Motor Vehicle Commission<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Request dated September 29, 2008

On site review of the following segments of the detailed Employee Training Plan of the contract awarded to Parsons Commercial Technology Group of Pasadena, California (“Parsons”):

1. Training of the contractors’ inspection employees to enable them to perform the inspection and enforcement of *N.J.A.C. 13:20-32.20* Item a, Section 4.
2. Detailed Inspector Reference Manual describing inspection test procedures as they apply to *N.J.A.C. 13:20-32.20* Item a, Section 4.

Request dated January 8, 2009

Duplicate of OPRA request dated September 29, 2008.

Request dated September 2, 2009

Copies of the following segments of the Detailed Employee Training Plan of the contract awarded on March 27, 2008 to Parsons:

1. Training of the contractors’ inspection employees to enable them to perform the inspection and enforcement of *N.J.A.C. 13:20-32.20* Item a, Sections 2 and 4.
2. Detailed Inspector Reference Manual describing inspection test procedures and method of application as they apply to enforcement of *N.J.A.C. 13:20-32.20* Item a, Sections 2 and 4.

Request dated September 29, 2009

Copy of the segment of the detailed Employee Training Plan that enables Parsons’ employees to perform the inspection and enforcement of *N.J.A.C. 13:20-32.20* Item a, Sections 2 and 4, to ensure that all employees meet the training and licensing requirements specified by the contract. The requirement for this plan is specified on page 33 of the Request for Proposals (“RFP”) under 3.3.3.2., Employee Training and Certification.

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<sup>1</sup> No representation listed on record.

<sup>2</sup> Represented by Steve Robertson, Esq. (Trenton, NJ).

Request dated October 16, 2009

Copy of the segment of the detailed Employee Training Plan related to the inspection and enforcement of *N.J.A.C.* 13:20-32.20 Item a, Sections 2 and 4. This contract requirement is specified on page 33 of the RFP under 3.3.3.2., Employee Training and Certification. If this record as specified in the RFP is not available, the official documentation releasing the contractor from this specified requirement of the contract is requested.

**Requests Made:** September 29, 2008, January 8, 2009, September 2, 2009, September 29, 2009 and October 16, 2009

**Responses Made:** October 8, 2008, January 14, 2009, September 9, 2009, September 30, 2009 and October 23, 2009

**Custodian:** Joseph Bruno

**GRC Complaint Filed:** November 16, 2009<sup>3</sup>

**Background**

**September 29, 2008**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**October 8, 2008**

Custodian's response to the Complainant's OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian states that the information that the Complainant requests is currently being reviewed by Parsons and is due to be delivered to the New Jersey Motor Vehicle Commission by December 21, 2008. The Custodian further states that negotiations regarding the final contract are ongoing.

**January 8, 2009**

Complainant's OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**January 14, 2009**

Custodian's response to the Complainant's OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that Parsons' compliance date for performance under the contract with respect to the information requested by the Complainant has been extended to mid-summer of 2009.

**September 2, 2009**

Complainant's OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

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<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**September 9, 2009**

Custodian's response to the Complainant's OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that Parsons is still in the process of completing the new inspector training manual and that the records are not available but that they may be available by the end of the year.

**September 29, 2009**

Complainant's OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**September 30, 2009**

Custodian's response to the Complainant's OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian states the Complainant is requesting the identical information that he had previously requested in his September 2, 2009 OPRA request. The Custodian states that Parsons is still in the process of completing the new inspector training manual and that the requested records are not available.

**October 16, 2009**

Complainant's OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**October 23, 2009**

Custodian's response to the Complainant's OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states the Complainant is requesting the identical information that he had previously requested in his September 29, 2009 OPRA request. The Custodian states that Parsons is still in the process of completing the new inspector training manual and that the requested records are not available.

**November 16, 2009**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Pages 33, 34, 35, 61 and A-1 purported to be from a contract between Parsons and the New Jersey Motor Vehicle Commission dated March 27, 2008.
- Complainant's OPRA request dated September 29, 2008.
- Custodian's response to the OPRA request dated October 8, 2008.
- Complainant's OPRA request dated January 8, 2009.
- Custodian's response to the OPRA request dated January 14, 2009.
- Complainant's OPRA request dated September 2, 2009.
- Custodian's response to the OPRA request dated September 9, 2009.
- Complainant's OPRA request dated September 29, 2009.
- Custodian's response to the OPRA request dated September 30, 2009.
- Complainant's OPRA request dated October 16, 2009.
- Custodian's response to the OPRA request dated October 23, 2009.

- Page 6 of Parsons Draft Employee Training Plan, undated.

The Complainant states that he submitted OPRA requests to the Custodian on “various” dates. The Complainant appends to his complaint five (5) OPRA requests dated September 29, 2008, January 8, 2009, September 2, 2009, September 29, 2009 and October 16, 2009. The Complainant states that he received replies to his requests but does not state the dates that the requests were denied.

The Complainant further states that a contract was awarded by the State of New Jersey to Parsons dated March 27, 2008. The Complainant alleges that the contract is for a term of five (5) years and provides for a payment by the State to Parsons in the amount of two hundred eighty-six million dollars (\$286,000,000.00) for an enhanced motor vehicle inspection and maintenance system for the New Jersey Motor Vehicle Commission. The Complainant further alleges that provisions in the contract addressing employee training and certification require Parsons to submit to the State a detailed Employee Training Plan within two (2) months after the contract start date.

The Complainant states that the specific information he requested were segments of the contractor’s training plan that enables Parsons inspection forces to perform the inspection and enforcement of *N.J.A.C. 13:20-32.20* Item a, Sections 2 and 4. The Complainant asserts that the Custodian has denied him access to information and materials required to be provided to the State under the contract by the successful contractor.

**November 19, 2009**

Offer of Mediation sent to both parties.

**November 19, 2009**

The Complainant declines mediation.

**November 25, 2009**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**November 30, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 16, 2009.
- Custodian’s response to the OPRA request dated October 23, 2009.

The Custodian certifies that his search for the requested records involved submitting a request for the records to the New Jersey Motor Vehicle Commission Director of Inspection Services. The Custodian certifies that the Director informed the Custodian that the requested records had not been prepared and submitted to the New Jersey Motor Vehicle Commission as of the date of the Complainant’s most recent request which was received by the Custodian on October 21, 2009. The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on October 21, 2009 and responded in writing to the request on October 22, 2009.<sup>4</sup> The Custodian certifies that the Complainant requested a document that is to be prepared and submitted to the New Jersey Motor Vehicle Commission pursuant to the terms of the contract governing the implementation and operation of the Enhanced Motor Vehicle Inspection/Maintenance System but that said record had not been prepared and submitted by the vendor as of November 30, 2009. For this reason, the Custodian certifies that the record requested by the Complainant does not presently exist. The Custodian avers that he informed the Complainant in response to the Complainant's OPRA request that the information the Complainant requested is currently unavailable. The Custodian further avers that Parsons continues to work toward the completion of the new inspector training manual by making changes to software, hardware and safety equipment. The Custodian also certifies that there is no record responsive to the Complainant's request in the alternative for the "official documentation releasing the contractor from [the requirement that the contractor provide a detailed Employee Training Plan related to the inspection and enforcement of *N.J.A.C.* 13:20-32.20 Item a, Sections 2 and 4].

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1.

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<sup>4</sup> The written response to this OPRA request is dated October 23, 2009.

Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The evidence of record in this complaint reveals the Complainant submitted to the Custodian five (5) OPRA requests over a thirteen (13) month period for selected segments of a detailed Employee Training Plan prepared by Parsons, as required pursuant to a contract awarded to Parsons by the State of New Jersey. The Complainant's first two (2) OPRA requests, dated September 29, 2008 and January 8, 2009, are identical. The Complainant's remaining three (3) OPRA requests, dated September 2, 2009, September 29, 2009 and October 16, 2009, are substantially identical to the first two (2) requests except for a few minor modifications made by the Complainant.<sup>5</sup> All five (5) of the Complainant's requests seek the same records.

The evidence of record also reveals that the Custodian responded to each of the Complainant's five (5) requests in a timely manner by denying the request and informing the Complainant that the record is unavailable because it is pending creation/approval. In some of the responses, the Custodian also provided the Complainant with an estimated time frame within which the agency expected the record to be available for review.

In the SOI, the Custodian only addressed the most recent of the Complainant's five (5) requests for the records relevant to the complaint. The Custodian certified that the records requested by the Complainant have not been submitted by Parsons to the agency [as of November 30, 2009]; therefore there are no records responsive to the Complainant's request.<sup>6</sup> Further, the Complainant herein has submitted no evidence to refute the Custodian's certification.

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the complainant's request, the custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access."

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<sup>5</sup> In his last three (3) requests, when the Complainant cited *N.J.A.C. 13:20-32.20* Item a, Section 4, he also added Section 2. In his last two (2) requests instead of identifying the "Inspector Reference Manual" by name, the Complainant cited to Article 3.3.3.2 of the Parsons contract which purportedly is the section that describes the Manual and its contents. Finally, the Complainant modified his most recent request by adding an alternative request. None of the modifications resulted in a substantive change to the form of request.

<sup>6</sup> Although the Custodian did not address in the SOI the Complainant's requests dated September 29, 2008, January 8, 2009, September 2, 2009 and September 29, 2009; if, as certified by the Custodian, the records were non-existent as of the date of the Complainant's most recent OPRA request, October 16, 2009, then, *a fortiori*, they were non-existent on the date of each of the Complainant's prior four (4) OPRA requests for those identical records.



Therefore, because the Custodian herein certified that there are no records responsive to the Complainant's request, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. *See also* Pusterhofer, supra.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian certified that there are no records responsive to the Complainant's request, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. *See also* Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.  
Executive Director

October 19, 2010