



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

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Kenneth Vercammen  
Complainant

Complaint No. 2010-297

v.

Township of West Windsor (Mercer)  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified that no records responsive to the Complainant’s OPRA request exist and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.
3. In the instant matter, the Custodian failed to provide the Complainant with a written response to the October 22, 2010 OPRA request as mandated by N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g. While unlawful, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Furthermore, the Custodian certified that the Township and Township Police Department are not in possession of the requested records. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



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 27<sup>th</sup> Day of March, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: April 5, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 27, 2012 Council Meeting**

**Kenneth Vercammen<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-297**

v.

**Township of West Windsor (Mercer)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Training materials for each and every "test" usually given to individuals under suspicion of Driving While Intoxicated ("DWI") including manuals, lesson plans, texts, tests, and article reprints kept by the police.
2. Many departments rely on the National Highway Traffic Safety Administration ("NHTSA") Manuals dealing with field sobriety. If your department relies on these manuals, please provide in writing the website link to the specific manual relied on by your police department.
3. Documents which set forth your police department's policy on accommodating person's with physical disabilities who are requested by police to perform the field sobriety test of walk and turn.
4. Documents which set forth your police department's policy on accommodating person's with physical disabilities who are requested by police to perform the field sobriety test of finger to nose.
5. Documents which set forth your police department's policy on accommodating person's with physical disabilities who are requested by police to perform other field sobriety tests, such as the one legged stand.
6. Documents which set forth procedures for officers in your police Department to achieve certification or recognition as a Drug Recognition Evaluation ("DRE").
7. The most recent training manual for Field Sobriety Testing by your police department
8. The NHTSA Manuals dealing with field sobriety.

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

<sup>2</sup> Represented by Rachel Doobraj, Esq., of Herbert, Vanness, Cayci, & Goodell, P.C. (Lawrenceville, NJ).  
Kenneth Vercammen v. Twp. of West Windsor (Mercer), 2010-297 – Findings and Recommendations of the Executive Director

9. Documents from NHTSA dealing with field sobriety tests
10. Documents from NJ Division of Highway Traffic Safety dealing with field sobriety tests.
11. Documents from the NJ State Police involving Horizontal Gaze Nystagmus (“HGN”) testing.
12. Documents signed by Kevin Flanagan of NJ State Police.

**First Request Made:** October 22, 2010

**Second Request Made:** November 9, 2010<sup>3</sup>

**Response Made:** None; November 10, 2010

**Custodian:** Sharon Young<sup>4</sup>

**GRC Complaint Filed:** November 12, 2010<sup>5</sup>

### Background

#### **October 22, 2010**

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 via facsimile. The Complainant states that he is preparing an article on field sobriety tests by police departments and that he has several published works. The Complainant maintains that the requested documents are public records pursuant to established law.

#### **November 9, 2010**

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 via facsimile and attaching a copy of a Facsimile Communication Failure Report dated November 9, 2010.<sup>6</sup> The Complainant states that he is preparing an article on field sobriety tests by police departments and that he has several published works. The Complainant maintains that the requested documents are public records pursuant to established law.

#### **November 9, 2010**

Letter from the Complainant to the Custodian. The Complainant states that on October 22, 2010, his firm submitted to the Custodian an OPRA request that was ignored. The Complainant further states that on November 9, 2010, he submitted a second (2<sup>nd</sup>) OPRA request to the Custodian. The Complainant asserts that he was informed by an employee of the Township of West Windsor’s (“Township”) Clerk’s Office that the request should have been served upon the Township Police Department and not the

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<sup>3</sup> The Complainant’s October 22, 2010 and November 9, 2010 requests are identical.

<sup>4</sup> Township of West Windsor Police Lieutenant and Records Custodian, Robert Garofalo responded to the Complainant’s request.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

<sup>6</sup> Indicating that the Complainant’s attempts to fax the requests to the Custodian were not successfully transmitted.

Clerk's office. The Complainant states that the Custodian effectively also ignored the November 9, 2010 OPRA request.

The Complainant argues that the forwarding of the requests to the Police Department is unlawful because the Township Clerk and Custodian in this instant Complaint, Sharon Young, is the official records custodian of the Township.

**November 10, 2010**

Township Police Department Custodian, Lieutenant Robert Garofalo's, response to the November 9, 2010 OPRA request. Lt. Garofalo responds in writing via letter to the Complainant's request on the first business day following receipt of the Complainant's request. Lt. Garofalo asserts that the Township Police Department received the Complainant's November 9, 2010 OPRA request from the Clerk. Lt. Garofalo asserts that neither the Township nor the Police Department maintain the requested records.

**November 12, 2010**

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

- Complainant's OPRA request dated October 22, 2010
- Complainant's OPRA request dated November 9, 2010
- Letter from the Complainant to the Custodian dated November 9, 2010

The Complainant states that no records were provided and that the Complainant's letter to the Custodian dated November 9, 2010 establishes this. The Complainant agrees to mediate this complaint.

**November 26, 2010**

Offer of Mediation sent to the Custodian.

**November 30, 2010**

The Custodian agrees to mediate the Complaint.

**November 30, 2010**

The Complaint is referred to mediation.

**December 17, 2010**

The Complaint is referred back from mediation.

**December 23, 2010**

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

**January 4, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 22, 2010
- Complainant's OPRA request dated November 9, 2010
- Letter from the Complainant to the Custodian dated November 9, 2010

- Lt. Robert Garofalo’s response to the November 9, 2010 OPRA request

The Township Clerk certifies that the Township does not maintain any records responsive to his request and therefore there are no applicable retention or destruction schedules in the instant matter. The Clerk certifies that that upon receiving the Complainant’s first OPRA request on October 22, 2010, the request was forwarded to the Township Police Department for review. The Custodian certifies that the Police Department informed the Township that there were no records responsive to the Complainant’s request, but that the Police Department failed to inform the requestor.

The Clerk further certifies that the Township was having problems with their fax machine on November 9, 2010. The Clerk certifies that unbeknownst to the Township, the Complainant’s faxed November 9, 2010 OPRA request was not received by the Township. The Custodian certifies that once the Complainant contacted the Township to notify them that a request had been sent, an alternate fax machine number was given was provided to the Complainant. The Clerk certifies that upon receipt of the November 9, 2010 OPRA request and noting that it was identical to the first OPRA request, the November 9, 2010 OPRA request was forwarded to the Police Department’s custodian. The Clerk certifies that the Police Department informed the Complainant in writing that there were no records responsive to this request on November 10, 2010.

### Analysis

#### **Whether the Custodian timely responded to the Complainant’s October 22, 2010 OPRA request?**

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Moreover, OPRA states that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the*

*failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Complainant made two identical OPRA requests on October 22, 2010 and November 9, 2010. Although the Clerk certified in the SOI that that upon receiving the Complainant’s first OPRA request on October 22, 2010, he forwarded the request to the Township Police Department for review, there is no evidence in the record that the Clerk responded in writing to the Complainant’s October 22, 2010 OPRA request within the statutorily mandated seven (7) business days.

OPRA requires that a custodian must respond in writing within seven (7) business days after receipt of an OPRA request. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. or the request is “deemed” denied. Thus, because there is no evidence in the record to establish that the Township responded to the Complainant’s request in writing, the Complainant’s OPRA request is “deemed” denied.

Therefore, the Clerk’s failure to respond in writing to the Complainant’s OPRA October 22, 2010 request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009).

### **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.

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<sup>7</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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. 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 Council has consistently held that there exists no denial of access when a custodian has demonstrated that no records responsive to a complainant’s request exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed and the Complainant submitted no evidence to refute said certification. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In the matter before the Council, the Complainant made two identical OPRA requests seeking various records pertaining to Township Police procedures regarding traffic enforcement. As in Pusterhofer, the Custodian herein certified in the SOI that there are no records in the Township’s possession that are responsive to the Complainant’s requests. Furthermore, the Complainant has provided no evidence to refute the Custodian’s certification in this regard.

Therefore, because the Custodian certified that no records responsive to the Complainant’s OPRA request exist and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6. Because the Custodian has certified that there are no records responsive to the request, the Council declines to address the validity of the Complainant’s requests.



**Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant matter, the Custodian failed to provide the Complainant with a written response to the October 22, 2010 OPRA request as mandated by N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g. While unlawful, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Furthermore, the Custodian certified that the Township and Township Police Department are not in possession of the requested records. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified that no records responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.
3. In the instant matter, the Custodian failed to provide the Complainant with a written response to the October 22, 2010 OPRA request as mandated by N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g. While unlawful, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Furthermore, the Custodian certified that the Township and Township Police Department are not in possession of the requested records. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 20, 2012