



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**May 28, 2013 Government Records Council Meeting**

Thomas DelloRusso  
Complainant

Complaint No. 2012-11

v.

New Jersey Department of Law & Public Safety,  
Division of State Police  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 Supplemental 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 current Custodian failed to fully comply with the Council’s April 30, 2013 Interim Order because he failed to provide a certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director within the five (5) business days. However, the Custodian’s Counsel states that the Custodian provided the Complainant with the responsive MVR on May 7, 2013. Further, on May 10, 2013, the Complainant indicated that he received the responsive MVR.
2. The former Custodian violated N.J.S.A. 47:1A-6 by failing to prove that he lawfully denied access to the responsive MVR. The current Custodian also failed to provide a certified confirmation of compliance to the Executive Director within five (5) business days as required by the Council’s Interim Order. However, evidence shows that the current Custodian provided the Complainant with a copy of the MVR responsive to his December 6, 2011 OPRA request. Further, the Complainant indicated that he received a copy of the MVR. Therefore, the former and current 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 28<sup>th</sup> Day of May, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 5, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 28, 2013 Council Meeting**

**Thomas DelloRusso<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-11**

**v.**

**New Jersey Department of Law & Public Safety,  
Division of State Police<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Mobile Video Recording (“MVR”) of an automobile accident in Oldman Township, New Jersey, Case Number D0202011-482A which occurred on May 25, 2011 at 0644 hours.<sup>3</sup>

**Request Made:** December 6, 2011  
**Response Made:** January 9, 2012  
**GRC Complaint Filed:** January 11, 2012<sup>4</sup>

**Background**

At its April 30, 2013 public meeting, the Council considered the April 23, 2013 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, found that:

1. The Custodian failed to prove that there was a lawful denial of access to the requested MVR pursuant to N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-9(a) and N.J.S.A. 53:2-3. As such, the Custodian must disclose the MVR responsive to the Complainant’s request.
  
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

---

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

<sup>2</sup> Gregory Shawaryn, Custodian of Records. The Custodian at the time of the Denial of Access Complaint and Statement of Information was Ismael E. Vargas. Represented by Deputy Attorney General Christine Kim.

<sup>3</sup> The Complainant requests additional records which are not at issue in this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

On May 1, 2013, the Council distributed its Interim Order to all parties. On May 7, 2013, the Custodian's Counsel responded to the Council's Interim Order. Counsel states that on May 7, 2013, the Custodian provided the Complainant with the responsive MVR to his OPRA request via U.S. Mail. Counsel provides a copy of the Government Records Request Receipt which states that the Custodian is providing the MVR responsive to the request with the audio redacted in accordance with N.J.S.A. 47:1A-1.1 and *N.J.A.C.* 13:1E-3.2.<sup>5</sup> Counsel fails to include a certified confirmation of compliance as required by the Interim Order.

On May 10, 2013, the Complainant e-mailed the Custodian stating that he received the requested MVR. The Complainant also states that the MVR fulfills the request and no further action is required.

### Analysis

#### Compliance

On April 30, 2013 the Council ordered the Custodian provide a copy of the responsive MVR to the Complainant's December 6, 2011 OPRA request within five (5) business days of receipt of the Interim Order. On May 1, 2013, the Council disseminated its Interim Order. Thus, the Custodian's response was due by close of business on May 8, 2013.

The current Custodian failed to fully comply with the Council's April 30, 2013 Interim Order because he failed to provide a certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director within the five (5) business days. However, the Custodian's Counsel states that the Custodian provided the Complainant with the responsive MVR on May 7, 2013. Further, on May 10, 2013, the Complainant indicated that he received the responsive MVR.

#### Knowing and Willful

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:

---

<sup>5</sup> The Complainant does not dispute that the MVR audio was unlawfully redacted.

“... 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 (Fielder 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)).

The former Custodian violated N.J.S.A. 47:1A-6 by failing to prove that he lawfully denied access to the responsive MVR. The current Custodian also failed to provide a certified confirmation of compliance to the Executive Director within five (5) business days as required by the Council’s Interim Order. However, evidence shows that the current Custodian provided the Complainant with a copy of the MVR responsive to his December 6, 2011 OPRA request. Further, the Complainant indicated that he received a copy of the MVR. Therefore, the former and current 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 current Custodian failed to fully comply with the Council’s April 30, 2013 Interim Order because he failed to provide a certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director within the five (5) business days. However, the Custodian’s Counsel states that the Custodian provided the Complainant with the responsive MVR on May 7, 2013. Further, on May 10, 2013, the Complainant indicated that he received the responsive MVR.
2. The former Custodian violated N.J.S.A. 47:1A-6 by failing to prove that he lawfully denied access to the responsive MVR. The current Custodian also failed to provide a certified confirmation of compliance to the Executive Director within five (5) business days as required by the Council’s Interim Order. However, evidence shows that the current Custodian provided the Complainant with a copy of the MVR responsive to his December 6, 2011 OPRA request. Further, the Complainant indicated that he received a copy of the MVR. Therefore, the former and current

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: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

May 21, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

April 30, 2013 Government Records Council Meeting

Thomas DelloRusso  
Complainant

Complaint No. 2012-11

v.

New Jersey Department of Law & Public Safety,  
Division of State Police  
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council ("Council") considered the April 23, 2013 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 failed to prove that there was a lawful denial of access to the requested MVR pursuant to N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-9(a) and N.J.S.A. 53:2-3. As such, the Custodian must disclose the MVR responsive to the Complainant's request.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 1, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 30, 2013 Council Meeting**

**Thomas DelloRusso<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-11**

**v.**

**New Jersey Department of Law & Public Safety,  
Division of State Police<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Mobile Video Recording (“MVR”) of an automobile accident in Oldman Township, New Jersey, Case Number D0202011-482A which occurred on May 25, 2011 at 0644 hours.<sup>3</sup>

**Request Made:** December 6, 2011  
**Response Made:** January 9, 2012  
**GRC Complaint Filed:** January 11, 2012<sup>4</sup>

**Background<sup>5</sup>**

**Request and Response**

On December 6, 2011, the Complainant submitted his Open Public Records Act (“OPRA”) request with the New Jersey State Police (“NJSP”) seeking the MVR listed above. On January 9, 2011, the twenty-first (21<sup>st</sup>) business day following receipt of such request, the Custodian responded. The Custodian states that he was advised by the Criminal Justice Records Bureau (“CJRB”) that in accordance with the Standard Operating Procedures (“SOP”) and the NJ Court Rules, the requested MVR will not be released to any person other than a municipal prosecutor. The Custodian also states that since the Complainant is seeking access to records regulated by NJ Court Rules, OPRA is not the proper vehicle for access. The Custodian further states that the requested MVR is governed by SOP D-5 which was promulgated by N.J.S.A.

---

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

<sup>2</sup> Ismael E. Vargas, Custodian of Records. Represented by DAG Christine Kim, on behalf of the NJ Attorney General.

<sup>3</sup> The Complainant requests additional records which are not at issue in this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Thomas DelloRusso v. New Jersey Department of Law & Public Safety, Division of State Police, 2012-11 – Findings and Recommendations of the Executive Director

53:2-3 and thus the Complainant must follow NJ Court Rule 7:7-7(a) when seeking discoverable materials.<sup>6</sup>

### Denial of Access Complaint

On January 11, 2012, the Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that the Custodian unlawfully denied him access to the MVR. The Complainant argues that NJ Court Rule 7:7-7(a) referenced by the Custodian in his denial appears to relate to matters in litigation or discovery. The Complainant also argues that the motor vehicle accident which is the subject of the MVR is not currently being litigated and even if said accident was in litigation, it has no bearing on whether a document is available under OPRA. The Complainant asserts that this MVR was recorded on a public road. The Complainant also asserts that the Custodian could argue that the MVR is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1; however there was no investigation or enforcement proceeding related to this accident.

### Statement of Information

On February 13, 2012, the Custodian filed his Statement of Information (“SOI”). The Custodian certifies that he denied the Complainant access to the requested MVR pursuant to N.J.S.A. 47:1A-9, N.J.S.A. 53:2-3 and SOP D-5. Custodian’s Counsel argues that N.J.S.A. 47:1A-1 states “all government records shall be subject to public access unless exempt from...any other statute...” Counsel also argues that pursuant to N.J.S.A. 53:2-3, the Superintendent of NJSP may decline to issue a copy of documents pertaining to any automobile accident when the “...interests of law enforcement and public safety so require.” Counsel further argues that SOP D-5 was adopted in furtherance of pursuant to N.J.S.A. 53:2-3. Counsel states that SOP D-5 states that MVRs may be obtained by prosecutors and defense counsel through the CJRB. Counsel argues that the Complainant should attempt to obtain the MVR through the prosecutor. Counsel asserts that MVRs are part of a police investigation and evidence. Counsel requests that in the interests of law enforcement and public safety, the MVR not be produced under OPRA.<sup>7</sup>

## Analysis<sup>8</sup>

### Unlawful Denial of Access

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

---

<sup>6</sup> The Custodian references NJ Court Rule 7:7-7(a) which provides in relevant part “[i]f the government is represented by the municipal or a private prosecutor, discovery shall be available to the parties only as provided by this rule, unless the court rules otherwise...all discovery requests shall be served on the municipal prosecutor, who shall be responsible for making government discovery available to the defendant.”

<sup>7</sup> The Council notes that the Complainant requested to see a copy of SOP D-5; however, Custodian’s Counsel stated that the SOP D-5 was not subject to disclosure pursuant to *N.J.A.C.* 13:1E-3.2(a)(1).

<sup>8</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

Thomas DelloRusso v. New Jersey Department of Law & Public Safety, Division of State Police, 2012-11 – Findings and Recommendations of the Executive Director

“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.

OPRA also provides

“The provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...any other statute...” N.J.S.A. 47:1A-9(a).

N.J.S.A. 53:2-3 states:

“The Superintendent of [NJSP] is authorized upon request, to supply to any applicant a certified copy of...any...information...pertaining to any automobile accident...on file with [NJSP]. The Superintendent...subject to the approval of the Attorney General, may prescribe rules and regulations governing applications for any such certified copies...the said superintendent may decline to issue any such certified copy when, in his judgment, the interests of law enforcement and public safety so require.”

Here, the Complainant requested an MVR of an accident. The Custodian responded in writing to the Complainant’s OPRA request stating that he was advised by the CJRB that in accordance with the SOP and NJ Court Rules, the responsive MVR will not be released to anyone other than a municipal prosecutor. The Custodian also denied the Complainant access to the requested MVR because release of such record is governed by SOP D-5, promulgated by N.J.S.A. 53:2-3.

The Complainant argued in this Denial of Access Complaint that the litigation statute of the motor vehicle accident subject of the MVR has no bearing on whether it is available under OPRA. Conversely, Custodian’s Counsel asserted in the SOI that SOP D-5 was adopted in furtherance of N.J.S.A. 53:2-3,. Counsel also asserted that pursuant to N.J.S.A. 53:2-3, the interests of law enforcement and public safety require the responsive MVR not be released under OPRA.

The statute cited by the Custodian, N.J.S.A. 53:2-3, only addresses when one makes a request for a certified copy of information related to an automobile accident. Here, the Complainant did not request a certified copy of the MVR. Thus, this statute is inapplicable in the instant complaint. Further the Custodian had the burden to prove that in the interest of law enforcement and public safety the requested MVR should not be released under OPRA. The Custodian failed to do so. The Custodian has failed to articulate any reason why the requested MVR should not be released to the Complainant. The Custodian’s argument of “the interests of law enforcement and public safety require the MVR not be produced...” is insufficient.

In addition, the Custodian cited to SOP D-5 which was adopted pursuant to N.J.S.A. 53:2-3. However, as previously stated SOP D-5 is inapplicable in the instant complaint because the Complainant did not request a certified copy of the MVR. Further, there is no evidence in the record that SOP D-5 has the force of law.

Therefore, the Custodian failed to prove that there was a lawful denial of access to the requested MVR pursuant to N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-9(a) and N.J.S.A. 53:2-3. As such, the Custodian must disclose the MVR responsive to the Complainant's request.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to prove that there was a lawful denial of access to the requested MVR pursuant to N.J.S.A. 47:1A-6, N.J.S.A. 47:1A-9(a) and N.J.S.A. 53:2-3. As such, the Custodian must disclose the MVR responsive to the Complainant's request.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

April 23, 2013

---

<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>10</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Thomas DelloRusso v. New Jersey Department of Law & Public Safety, Division of State Police, 2012-11 – Findings and Recommendations of the Executive Director