



**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**

**December 18, 2012 Government Records Council Meeting**

Benjamin Moore  
Complainant

Complaint No. 2011-281

v.

Township of Commercial (Cumberland)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the December 11, 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. Because the Custodian certified in the Statement of Information dated September 22, 2011 that no records responsive to the Complainant’s December 22, 2010 request or item numbers 2 and 3 of the Complainant’s April 13, 2011 request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Custodian certified in her Statement of Information dated September 22, 2011 that she disclosed to the Complainant the record responsive to request item number 1 of the Complainant’s April 13, 2011 OPRA request, which is a copy of the audit for 2010, and because the Complainant failed to provide any proof to dispute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said record.

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 18<sup>th</sup> Day of December, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 20, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Benjamin Moore<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-281**

v.

**Township of Commercial (Cumberland)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Request dated December 22, 2010

A copy of the names of the veteran's and senior files that are missing together with the dates when the files were missing.

Request dated April 13, 2011

1. Audit for 2010.
2. A copy of files and dates of veterans missing forms.
3. List of veterans not eligible for deduction.

**Requests Made:** December 22, 2010 and April 13, 2011

**Response Made:** December 28, 2010 and April 18, 2011

**Custodian:** Hannah Nichols, Clerk

**GRC Complaint Filed:** August 29, 2011<sup>3</sup>

**Background**

**December 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. The Complainant stated that he will pick up the records at the Clerk's office.

**December 28, 2010**

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request.<sup>4</sup> The Custodian certifies in the Statement of Information that she informed the

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

<sup>2</sup> Represented by Thomas Seeley, Esq. (Bridgeton, NJ); however, there are no submissions from the Custodian's Counsel to the GRC on file.

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

<sup>4</sup> The Complainant and the Custodian both acknowledge that the Custodian responded to the Complainant on the third (3<sup>rd</sup>) day following receipt of the request; however, no copy of the response to the Complainant's December 22, 2010 request was attached to the Complaint or to the Statement of Information.

Complainant that the requested records could not be located in the municipality's files. The Custodian further certifies that she will check with the State of New Jersey.

**April 13, 2011**

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. The Complainant stated that he will pick up the records at the Clerk's office.

**April 18, 2011**

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request in writing on the third (3<sup>rd</sup>) business day following receipt of such request. The Custodian states that she is disclosing a copy of the Complainant's request item number 1, which is the 2010 audit report. The Custodian also informs the Complainant that she does not have records responsive to his request for items numbered 2 and 3 but that she discussed his request for items numbered 2 and 3 with the state auditors and that the state auditors said that request items numbered 2 and 3 are not subject to disclosure. The Custodian further informs the Complainant that the state auditors said he could purchase a copy of the 2010 and 2011 printouts of every property owner in Commercial Township, and then compare the printouts to see who obtained a deduction in 2010 and who lost a deduction in 2011.

**August 29, 2011**

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

- Complainant's OPRA request dated December 22, 2010
- Complainant's OPRA request dated April 13, 2011
- Custodian's response to the OPRA request dated April 18, 2011
- Letter from the Complainant to the New Jersey Department of Treasury, undated<sup>5</sup>

The Complainant states that he provided his OPRA request to the Custodian on December 22, 2010, and that the Custodian responded to the request on December 28, 2010. The Complainant also states that on December 15, 2010 he filed a complaint with the GRC concerning the record request that is the subject of the instant complaint.<sup>6</sup>

The Complainant does not indicate whether he agrees to mediate this complaint.

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<sup>5</sup> This letter is seeking information regarding how to file a Denial of Access Complaint. The Complainant informs the Department of Treasury that he filed OPRA requests with the Township of Commercial dated December 22, 2010 and April 13, 2011 and was denied records. The Complainant tells the Department of Treasury that he wishes to file a Denial of Access Complaint against the Township of Commercial.

<sup>6</sup> The Complainant alleges that his complaint number for the Denial of Access Complaint he filed on December 15, 2010 is C54910. This is not a valid GRC complaint number. Further, a check of all previous complaints filed by the Complainant against the Township of Commercial failed to corroborate the complainant's allegation.

**August 31, 2010**

Offer of Mediation sent to the Custodian. The Custodian does not agree to mediate this complaint.

**September 15, 2011**

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

**September 22, 2011<sup>7</sup>**

Custodian’s SOI attaching the Complainant’s Denial of Access Complaint dated August 29, 2011.

The Custodian certifies that the records responsive to the request must be retained for seven (7) years in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that she does not have the records responsive to the Complainant’s December 22, 2010 OPRA request but that she checked with Pat Wright at the New Jersey Division of Taxation to see if the state had the records. The Custodian certifies that Ms. Wright informed her that the Complainant could purchase a copy of the 2010 and 2011 printouts of every property owner in Commercial Township (Mod-4), and then compare the printouts.

The Custodian further certifies that the Complainant filed an OPRA request on April 13, 2011 requesting (1) the 2010 audit, (2) a copy of files and dates of veteran’s missing forms, and (3) a list of veterans not eligible for a deduction. The Custodian certifies that she responded to the Complainant’s request on April 18, 2011, by providing the Complainant with a copy of the 2010 audit he requested. The Custodian also certifies that she does not have records responsive to the Complainant’s request for items numbered 2 and 3 but that she discussed his request for items numbered 2 and 3 with the state auditors and that the state auditors said that request items numbered 2 and 3 are not subject to disclosure.<sup>8</sup>

**December 21, 2011**

Letter from the Custodian to the GRC. The Custodian informs the GRC that when the Division of Taxation recently audited the tax assessor’s files, they found that many property owners did not have proper documentation on file to be eligible for the allowances they had been receiving. The Custodian further informs the GRC that the Division of Taxation therefore required the municipal tax assessor to send out letters to all property owners who were receiving veteran’s deductions, senior citizen deductions and disability deductions informing them to send the proper documentation to the tax assessor so that they could continue to qualify for an allowance. The Custodian states that because the property owners sent in their information, she is now in possession of records that reveal the names of veterans and widows who were missing documents. The

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<sup>7</sup> The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

<sup>8</sup> The Custodian addresses several other OPRA requests filed by the Complainant; however, those requests are not relevant to the instant complaint.

Custodian further informs the GRC that she enclosed copies of the referenced records and will send copies of the records to the Complainant in satisfaction of his December 22, 2010 request and in satisfaction of request items numbered 2 and 3 of his April 13, 2011 request, which were the requests that formed the basis of the instant complaint.

**October 12, 2012**

Telephone call from the GRC to the Complainant. The GRC tells the Complainant that the Custodian stated that she sent him records on or about December 21, 2011, which the GRC believes may be the records he requested in his December 22, 2010 and April 13, 2011 OPRA requests. The GRC asks the Complainant if the records he received from the Custodian satisfied his OPRA requests, and if so, if he wishes to withdraw his complaint. The Complainant tells the GRC that he does not recall receiving any records from the Custodian that were responsive to his requests. The GRC asks the Complainant to clarify precisely which records he is seeking. The Complainant's description of the precise nature of the requested records is unclear to the GRC but based upon the Complainant's descriptions of the records he said he requested it appears to the GRC that the Custodian may have disclosed to the Complainant the records that were responsive to his December 22, 2010 and April 13, 2011 OPRA requests. The GRC informs the Complainant that the GRC will send duplicate copies of the records to him via UPS Next Day Air®. The GRC tells the Complainant to review the records and respond back to the GRC.

**October 12, 2012**

Letter from the GRC to the Complainant. The GRC confirms its October 12, 2012 telephone conversation with the Complainant and sends to the Complainant duplicate copies of the records that the Custodian forwarded to the GRC on December 21, 2011. The GRC asks the Complainant to check the records to see if they satisfy his December 22, 2010 and April 13, 2011 OPRA requests, and if so, to let the GRC know if he wants to withdraw his complaint or if he wants the GRC to continue with adjudication of the complaint.<sup>9</sup>

**October 23, 2012**

Telephone call from the GRC to the Complainant. The GRC calls for the Complainant to follow-up on its letter to the Complainant dated October 12, 2012. The Complainant's wife confirms that the Complainant did receive the GRC's letter dated October 12, 2012, and she further informs the GRC that the Complainant is in the veteran's hospital but will be home in a few days and will call the GRC at that time.<sup>10</sup>

**November 16, 2012**

Telephone call from the GRC to the Complainant. The GRC leaves a message for the Complainant to call the GRC as soon as possible to reply to the GRC's questions posed in its October 12, 2012 letter to him.<sup>11</sup>

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<sup>9</sup> The Complainant failed to respond to the GRC's requests.

<sup>10</sup> The Complainant failed to return the GRC's telephone call.

<sup>11</sup> The Complainant failed to return the GRC's telephone call.

**November 27, 2012**

Telephone call from the GRC to the Complainant. The GRC calls for the Complainant. The Complainant's wife informs the GRC that the Complainant is in the backyard and will return the GRC's telephone call momentarily.<sup>12</sup>

### Analysis

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

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...[t]he terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. (Emphasis added.)

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.

There is no dispute between the parties that the Complainant filed his OPRA requests on December 22, 2010 and April 13, 2011 and the Custodian responded to the requests in a timely manner on December 28, 2010 and April 18, 2011, respectively.

The Custodian certified that she did not have records responsive to the Complainant's December 22, 2010 request. With respect to the Complainant's April 13, 2011 request, the Custodian certified that she disclosed the record responsive to request

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<sup>12</sup> The Complainant failed to return the GRC's telephone call.

item number 1; however, the Custodian certified that she does not have records responsive to the Complainant's request for items numbered 2 and 3. The Custodian certified that she attempted to locate records responsive to the Complainant's request for items numbered 2 and 3 by contacting the New Jersey Division of Taxation to see if they state had copies of the records, but her effort was to no avail.

The Custodian subsequently sent a letter to the GRC dated December 21, 2011. In the letter the Custodian stated that the tax assessor sent a letter to all property owners who were receiving veteran's deductions, senior citizen deductions and disability deductions, asking them to submit documentation to the tax assessor so that they could continue to qualify for an allowance. The Custodian stated that many of the property owners sent in the requested documentation and she is now in possession of records that reveal the names of veterans and widows who were missing documents. The Custodian further informed the GRC that she was sending copies of the records to the Complainant in satisfaction of his December 22, 2010 request and in satisfaction of request items numbered 2 and 3 of his April 13, 2011 request.

The Custodian certified in the SOI that no records responsive to the Complainant's December 22, 2010 OPRA request, as well as request item numbers 2 and 3 of the Complainant's April 13, 2011 OPRA request exist. Further, the Complainant provided no evidence to refute the Custodian's certification.

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 did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the SOI dated September 22, 2011 that no records responsive to the Complainant's December 22, 2010 request or item numbers 2 and 3 of the Complainant's April 13, 2011 request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Further, because the Custodian certified in her Statement of Information dated September 22, 2011 that she disclosed to the Complainant the record responsive to request item number 1 of the Complainant's April 13, 2011 OPRA request, which is a copy of the audit for 2010, and because the Complainant failed to provide any proof to dispute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said record.



## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified in the Statement of Information dated September 22, 2011 that no records responsive to the Complainant's December 22, 2010 request or item numbers 2 and 3 of the Complainant's April 13, 2011 request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
  
2. Because the Custodian certified in her Statement of Information dated September 22, 2011 that she disclosed to the Complainant the record responsive to request item number 1 of the Complainant's April 13, 2011 OPRA request, which is a copy of the audit for 2010, and because the Complainant failed to provide any proof to dispute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said record.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

December 11, 2012