



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**

Stephen B. Levitt  
Complainant

Complaint No. 2012-161

v.

New Jersey State Commission of Investigation  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 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 the Custodian lawfully denied access to request item no. 1 and the questions sought in request item no. 2 because the Custodian certified that no records responsive exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Additionally, the Custodian lawfully denied access to the cover letter sought in request item no. 2 and request item no. 3 because any information acquired or any records created by the Commission of Investigation is exempt from public access pursuant to N.J.S.A. 47:1A-9(a) and N.J.S.A. 52:9M-15(d).

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 11, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Stephen B. Levitt<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-161**

v.

**New Jersey State Commission of Investigation<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Regarding the counties surveyed and summarized in the report Union Work, Public Pay, copies of:

1. Script used during the telephone or e-mail communications with the counties;
2. Questions asked and the cover letter to the initial written communications; and
3. Correspondents' names and addresses for each county.

**Request Made:** May 14, 2012

**Response Made:** May 22, 2012

**GRC Complaint Filed:** May 30, 2012<sup>3</sup>

**Background<sup>4</sup>**

**Request and Response:**

On May 14, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. On May 22, 2012, the fifth (5<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing denying the request because the requested records do not exist, are not in the Commission's possession, or are exempt from public access under OPRA because the Commission is a law enforcement agency with confidential investigative files.

**Denial of Access Complaint:**

On May 30, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC") challenging the Custodian's claim that the Commission is a "law enforcement agency" whose records are exempt from public access.

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

<sup>2</sup> Lee C. Seglen, Custodian of Records. No legal representation listed on record.

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

<sup>4</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.

### Statement of Information:

On July 20, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on or about May 15, 2012 and denied access to said request on May 22, 2012. The Custodian certifies that he denied access to request item nos. 1-2 because no records responsive exist since no script or list of questions were prepared or used during the Commission’s investigation. Regarding the cover letter requested in item no. 2 and the names and addresses requested in item no. 3, the Custodian certifies that the Commission sent official requests for information by mail to county governments with a cover letter and a detailed schedule of requested materials in lieu of subpoenas. The Custodian asserts that said records are exempt from public access pursuant to N.J.S.A. 52:9M-15(d). *See also I/M/O State Commission of Investigation*, 108 N.J. 35, 43 (1987); and Correctional Medical Services v. New Jersey, 426 N.J. Super. 106, 128 (App. Div. 2012).

### Analysis<sup>5</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 “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.

Additionally, OPRA’s provisions shall not abrogate any exemption of a government record from public access made pursuant to any other statute. N.J.S.A. 47:1A-9(a). The New Jersey Statute governing the Commission of Investigation, N.J.S.A. 52:9M-15(d), mandates that “[n]othing in [OPRA] shall be construed to require the commission to disclose any information acquired or any records created, except as provided by this section.”

Here, the Custodian denied access to the requested records on the basis that the records do not exist, are not maintained by the Commission, or are exempt from public access. The Custodian certified in his SOI that records responsive to request items no. 1-2 (the script and questions) do not exist. Additionally, the Custodian certified that the records responsive to request items no. 2-3 (cover letter and correspondents’ names and addresses) are exempt from public access pursuant to N.J.S.A. 52:9M-15(d).

Therefore, the Custodian lawfully denied access to request item no. 1 and the questions sought in request item no. 2 because the Custodian certified that no records responsive exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Additionally, the Custodian lawfully denied access to the cover letter sought in request item no. 2 and request item no. 3 because any information acquired or any records created by the Commission of Investigation is exempt from public access pursuant to N.J.S.A. 47:1A-9(a) and N.J.S.A. 52:9M-15(d).

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<sup>5</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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to request item no. 1 and the questions sought in request item no. 2 because the Custodian certified that no records responsive exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Additionally, the Custodian lawfully denied access to the cover letter sought in request item no. 2 and request item no. 3 because any information acquired or any records created by the Commission of Investigation is exempt from public access pursuant to N.J.S.A. 47:1A-9(a) and N.J.S.A. 52:9M-15(d).

Prepared By: Dara L. Barry  
Communications Manager

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

May 21, 2013