



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**September 29, 2016 Government Records Council Meeting**

Lourdes E. Rodriguez  
Complainant

v.

City of Trenton (Mercer)  
Custodian of Record

Complaint No. 2015-248

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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 has borne his burden of proof that he lawfully denied access to the requested 2004 and 2005 original payroll register, as described in the Complainant’s June 16, 2015 OPRA request, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., 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 29<sup>th</sup> Day of September, 2016

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: October 4, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2016 Council Meeting**

**Lourdes E. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-248**

v.

**City of Trenton (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the original payroll register for the years 2003, 2004, 2005, and 2006 for Lourdes E. Rodriguez, who worked in the Department of Housing and Economic Development, Division of Real Estate in 2003, 2004, and 2005, and for the City Clerk's Office in 2006.

**Custodian of Record:** Richard M. Kachmar

**Request Received by Custodian:** June 16, 2015

**Response Made by Custodian:** June 19, 2015; July 9, 2015; July 21, 2015

**GRC Complaint Received:** July 31, 2015

**Background<sup>3</sup>**

**Request and Response:**

On June 16, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 17, 2015, Custodian's Counsel forwarded the request to the following individuals: Diadina Allen, Terry McEwen, Steve Ponella, Moises Martinez, Ronette Chew, David L. Minchello, and Sonya McRae-Richards, asking them to "provide the requested documents, if they exist." On June 19, 2015, Personnel Officer Steve Ponella wrote to Diadina Allen, requesting an extension of time of two weeks to respond to the request, due to the search requiring documents stored either in his building or offsite. Ms. Allen responded that same day, asking Mr. Ponella for a specific date she could convey to the Complainant. On June 22, 2015, Mr. Ponella responded and stated a date of July 9, 2015. Ms. Allen responded that same day, advising Mr. Ponella that she had spoken with the Complainant, who agreed to the extension date.

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

<sup>2</sup> Represented by Marc A. McKithen, Esq. (Trenton, NJ).

<sup>3</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.

On July 9, 2015, Ms. Allen wrote to the Complainant, copying Cordelia Staton, Mr. McKithen, Mr. Minchello, and Ms. McRae-Richards, attaching responsive payroll registers for 2003 and 2006. She wrote that, according to the Division of Personnel, they had searched outside storage and three storage rooms inside City Hall. She stated that her team had worked with Management Information Staff (“MIS”) to determine if information could be retrieved by ADP, the previous payroll provider. She advised that according to MIS, ADP does not keep records beyond seven (7) years, and therefore do not have the missing records. She stated that MIS was looking to determine if any of the remaining records were located on the City’s servers, and if existing, whether they could be accessed. Ms. Allen explicitly noted in a later e-mail that FY 2004 and FY 2005 were not included in the response.

On July 14, 2015, Ms. Allen wrote to Mr. Ponella, “[i]n an effort to avoid a GRC complaint, please provide a time line in which this information will be provided to the requestor. This time frame/due date must be submitted by the end of day tomorrow.” Mr. Ponella wrote to Ms. Allen on July 15, 2015, advising that “[w]e have continued to look since the response was given last week. I expect to be able to provide documents for 2004 and 2005 by Friday, 7/17/2015 close of business if not before.” Ms. Allen responded to Mr. Ponella the same day, advising that she would inform the Complainant.

On July 17, 2015, Mr. Ponella wrote to the Ms. Allen, attaching two documents “that complete” the Complainant’s OPRA request. Ms. Allen forwarded this e-mail to the Complainant on that same day. Later that day, the Complainant wrote to Ms. Allen, asking why she was not provided copies of the original payroll registers for 2004 and 2005. She noted that the responsive documents provided for 2003 and 2006 contained information in a quarterly breakdown, while the documents provided for 2004 and 2005 did not. She requested the same format for 2004 and 2005 “or copies of the payroll register on a bi-weekly basis.”

On July 21, 2015, Ms. Allen responded to the Complainant, advising that “[w]e have checked the known storage locations within this building (City Hall) and external locations to find the requested documents.” Ms. Allen advised that they consulted with MIS staff, who contacted the former payroll provider. Ms. Allen further advised that the former payroll company only keeps records for 7 years; therefore they do not have the requested documents. Ms. Allen stated that the summary payroll documents produced for 2004 and 2005 are the documents located for those years.

#### Denial of Access Complaint:

On July 31, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she was wrongfully denied access to the 2004 and 2005 documents but made no further legal arguments.

#### Statement of Information:

On August 21, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that his office received the Complainant’s OPRA request on June 16, 2015. He averred that the Director of Personnel “on or before” June 19, 2015, realized that Personnel

staff would need to find documents stored in either Trenton City Hall or another location. The Custodian certified that his office responded in writing on June 19, 2015, requesting a two week extension. The Custodian additionally certified that his office thereafter responded in writing to the request on July 9, 2015, providing the 2003 and 2006 payroll information. He certified that the Complainant's 2004 and 2005 employee earnings records were not found but that his office responded on July 17, 2015, providing the available 2004 and 2005 payroll information.<sup>4</sup> The Custodian made no additional legal arguments other than asserting that no unlawful denial of access occurred.

### Additional Submissions

On September 2, 2016, the GRC sent a request for additional information to the Custodian, seeking further detail as to how the Director of Personnel obtained the 2003 and 2006 records but was unable to locate the records for 2004 and 2005. The GRC additionally sought further information regarding any searches undertaken to locate the "missing records."

On September 7, 2016, the Custodian's Counsel sought an extension until September 16, 2016, due to a family matter. The GRC granted that request, and the Custodian submitted a certification from the City's Director of Personnel Steven Ponella on September 16, 2016.

The Director certified that, upon receipt of the Complainant's OPRA request, he instructed a member of his staff to attempt to locate the responsive documents. He averred that that employee looked in places where the physical documents "may be kept," including the off-site storage location and storage located in City Hall. The Director certified that he also searched the storage located in City Hall. He further noted that he instructed the MIS to contact ADP, the vendor responsible for the payroll at the relevant time, and was informed that ADP maintained records "for seven years as required by applicable law."

The Director stated that the requested records are from "ten years and two administrations ago." He certified that he asked "long standing" personnel in the clerk's office where such records might be retained and received no additional information. He averred that he turned over records that were located and that there are no additional records of which he is aware. The Director certified that he exhausted all known places to search for the requested records.

### Analysis

#### 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.

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<sup>4</sup> He noted that redactions were made to delete the unrelated personal information of other employees. Because the Complainant did not raise objections to the redactions, the GRC declines to discuss the issue.

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that, with respect to the portion of the request seeking copies of the original payroll register for 2004 and 2005, he and his staff were unable to locate the documents after conducting a search. The Custodian additionally certified that he contacted ADP, who stated that they do not maintain such records after 7 years.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested 2004 and 2005 original payroll register, as described in the Complainant's June 16, 2015 OPRA request, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to the requested 2004 and 2005 original payroll register, as described in the Complainant's June 16, 2015 OPRA request, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Husna Kazmir  
Staff Attorney

September 22, 2016