



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**June 25, 2019 Government Records Council Meeting**

Christa L. Hayes  
Complainant

Complaint No. 2017-65

v.

City of Newark (Essex)  
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 1 seeking Bank Statement of Escrow Accounts for January 2017. N.J.S.A. 47:1A-6. Specifically, the Custodian stated in response and subsequently certified in the Statement of Information that he had not yet received the record, and he was under no obligation to provide a record that yet to be created at the time of the request. See Goeckel v. Chatham Borough Police Dep’t (Morris), GRC Complaint No. 2013-356 (July 2014), Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 2 seeking a report of outstanding checks issued by the City older than six (6) months, because the Custodian certified in the Statement of Information that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. 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 25<sup>th</sup> Day of June 2019

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 28, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
June 25, 2019 Council Meeting**

**Christa L. Hayes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-65**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

- 1) “Copy of the January 2017 Bank Statement of Escrow Accounts in its entirety – less any details that should be redacted pursuant to privacy regulations as outlined in OPRA statutes”
- 2) “Copy of the ‘Check Register by Check ID’ report for those OUTSTANDING Township-issued checks over 6 months in age from today [sic] date. (Please include Name, Date, Check # and Amount)”<sup>3</sup>

**Custodian of Record:** Kenneth Louis

**Request Received by Custodian:** February 20, 2017

**Response Made by Custodian:** February 22, 2017; March 17, 2017

**GRC Complaint Received:** March 30, 2017

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

**Request and Response:**

On February 20, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 22, 2017, the Custodian responded in writing stating that the request was sent to the City of Newark’s (“City”) Department of Finance (“Department”) for review. The Custodian then stated that Ms. Danielle Smith (“Ms. Smith”) of the Department informed the Custodian that the City did not utilize Edmunds Accounting Software (“Edmunds”), and therefore no responsive records exist.

On February 27, 2017, the Complainant responded to the Custodian, stating that the

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

<sup>2</sup> Represented by Kenyatta Stewart, Esq., Acting Corporation Counsel (Newark, NJ).

<sup>3</sup> The Complainant requested additional records not at issue in the instant complaint.

<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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

response only addressed two (2) of the items listed in the request. The Complainant asserted that Item Nos. 1 and 2 remained open and requested that the Custodian provide a response to those items.

On February 28, 2017, the Custodian replied to the Complainant, stating that the OPRA request was forwarded again to the Department to begin a search for relevant records. The Custodian also stated that an anticipated response would be on or before March 17, 2017.

On March 17, 2017, Ana Golinski (“Ms. Golinski”) responded to the Complainant in writing on behalf of the Custodian, providing a response forwarded from Ms. Smith regarding the remaining request items. The letter stated that the Department has not received the record responsive to Item No. 1, and therefore could not disclose it. Regarding Item No. 2, the letter stated that the outstanding check report does not list the names of the vendors; only the check numbers, dates, and dollar amounts. Ms. Golinski noted that a copy of the report was included as attached. Ms. Golinski noted that the Complainant could request the record under Item No. 1 in the future.

On March 20, 2017, the Complainant responded to Ms. Golinski with questions regarding the March 17 correspondence. The Complainant first asked whether Ms. Golinski’s mention of filing a future OPRA request for Item No. 1 meant that Ms. Golinski would not provide a responsive record for the current request. As for Item No. 2, the Complainant stated that the provided report was a record of outstanding checks issued within the last six (6) months, whereas she requested a report of outstanding checks that were older than six (6) months. The Complainant stated that she expected a response from Ms. Golinski and did not consider the OPRA request as closed.

Later that same day, Ms. Golinski replied to the Complainant. Ms. Golinski stated that the responsive record for Item No. 1 would be made available upon request if and when it became available. Ms. Golinski added that she was not required to provide records that were not created and was not required to address requests on an on-going nature, citing Blau v. Essex Cnty. Registrar, GRC Complaint No. 2003-97 (April 2005). Ms. Golinski also stated that the Department was not in possession of outstanding checks of over six months. Ms. Golinski stated that the record provided on March 17, 2017 was intended as a courtesy.

The Complainant responded again on March 20, 2017, inquiring as to whether she would need to provide a new OPRA request for record requested under Item No. 1.

#### Denial of Access Complaint:

On March 30, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she spoke with the City’s legal counsel at the time, Mr. Evans Anyanwu, Esq. (“Mr. Anyanwu”) on an unmentioned date to try and obtain additional clarification. The Complainant stated that she asked Mr. Anyanwu whether the City received the type of record requested under Item No. 1 at all, or if it had not yet been received from the Department. The Complainant asserted that she was unable to obtain any clarification from Mr. Anyanwu, leading to the complaint filing.

Regarding Item No. 1, the Complainant argued that her office had obtained a responsive record via a previous OPRA request. However, the Complainant stated that said record was not provided in its entirety, necessitating the current request.

Regarding Item No. 2, the Complainant expressed confusion as to why the list of outstanding checks would not include the names of the vendors/payees. Additionally, the Complainant argued that while the Custodian was not required to create a document in response to a request, OPRA's definition of a government record includes "information stored or maintained electronically." N.J.S.A. 47:1A-1.1 The Complainant asserted that the City could provide a printout or electronically transmit a copy of the database containing the requested information, including the name, date, check number, and amount.

#### Statement of Information:<sup>5</sup>

On May 18, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 20, 2017. The Custodian certified that on February 22, 2017, he responded to the Complainant indicating that the Edmunds program referenced in two (2) of the original four (4) items of the request was not used by the City. The Custodian then certified that the Complainant clarified her request five (5) days later, which the Custodian treated as a new OPRA request. The Custodian certified that the new request embodied the items at issue in this matter and forwarded the request to the Department on February 27, 2017. The Custodian then certified that on March 17, 2017, Ms. Golinski responded in writing and provided the Complainant with a report detailing outstanding checks and check numbers in its possession from October through December 2016.

The Custodian certified that after the current complaint was filed, an OPRA request was submitted by a third party for the same record sought in Item No. 1. The Custodian certified that on May 16, 2017, the Department forwarded the record to Mr. Anyanwu, and on that same day he forwarded the record to the Complainant in an attempt to resolve the current matter. The Custodian stated that no confirmation of delivery was received by the Complainant. The Custodian attached a copy of that record to the SOI.

The Custodian argued that he was under no obligation to create a record that does not exist. Librizzi v. Twp. of Verona Police Dep't, GRC Complaint No. 2009-213 (August 2010). Additionally, the Custodian asserted that the Complainant must submit a new request where access to a record yet to be received or approved by an agency is requested. Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (Interim Order dated February 28, 2007).

#### Additional Submissions

On May 22, 2019, the GRC requested additional information from the Custodian. On May 28, 2019, the Custodian requested additional time to respond, which the GRC granted to until June 7, 2019.

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<sup>5</sup> The complaint was referred to mediation on April 5, 2017. The Complaint was referred back from mediation on May 8, 2017.

On June 7, 2019, the Custodian responded to the GRC's request by providing certifications from Ms. Smith and Mr. Anyanwu. Specifically, the certifications provided responses to the following questions:

- 1) Please identify the accounting software used by the [City], and whether the bank statement could be produced from it?**

"The accounting software used by the [City] is PeopleSoft. The bank statement is not produced by the [City]'s accounting software. The bank statement is and has always been provided by the bank."

- 2) The City's Finance Department informed the Custodian that the bank statement was 'unavailable' at the time of the OPRA request. Does this mean that the bank statement was unavailable because it was not previously produced from the accounting software, or that the data within the bank statement had not been entered into the City's accounting software?**

"The bank statement was 'unavailable' at the time of the OPRA request does not mean that the bank statement was unavailable because it was not previously produced from the accounting software or that data within the bank statement had not been entered into the City's accounting software. The City's accounting software does not produce a bank statement."

- 3) Did the City produce the bank statement in response to a subsequent third-part OPRA request, or was the bank statement produced prior to receipt of said OPRA request?**

"The City does not produce a bank statement. The bank provides the bank statement to the [City]."

- 4) It was asserted that the bank statement was ultimately provided on May 16, 2017. Please provide a copy of this correspondence.**

"The bank statement was not produced but provided to the City Clerk's office via QuickBase from the Finance Department to be forwarded to the requestor on or around May 16, 2017 after the City had received the statement from the bank for the time period requested."

### 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.

January 2017 Bank Statement of Escrow Accounts (Item No. 1)

In Goeckel v. Chatham Borough Police Dep't (Morris), GRC Complaint No. 2013-356 (July 2014), the Council noted that “[t]he GRC has determined that a custodian was under no obligation to provide a record that had not been created at the time of an OPRA request. Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).”

In the current matter, the Complainant was informed by Ms. Golinski that the Department had not received the record, and therefore could not provide same in response to Item No. 1 of her OPRA request. On March 20, 2017 the Custodian certified in the SOI that the requested record did not exist at the time of the OPRA request. On June 7, 2019, in response to a request for additional information, Ms. Smith and Mr. Anyanwu provided additional certifications. Both individuals certified that the City does not have the ability to create the requested record, but receives it from the bank. They also certified that their accounting software does not have the ability to create or compile the information contained within the bank statement. Additionally, there is no evidence in the record to refute the Custodian’s certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 1 seeking Bank Statement of Escrow Accounts for January 2017. N.J.S.A. 47:1A-6. Specifically, the Custodian stated in response and subsequently certified in the SOI that he had not yet received the record, and he was under no obligation to provide a record that yet to be created at the time of the request. See Goeckel, GRC 2013-356, Blau, GRC 2003-75, Paff, GRC 2010-307, Delbury, GRC 2013-240.

Report of Outstanding Checks Issued by the City Over 6 Months Old (Item No. 2)

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, Item No. 2 of the Complainant’s OPRA request sought a report of outstanding checks older than six (6) months. On March 20, 2017, Ms. Golinski informed the Complainant that the Department did not have a report of outstanding checks older than six (6) months. Ms. Golinski then stated that the report that was provided on March 17, 2017 was intended as a courtesy. The Custodian also certified in the SOI that the record did not exist. Additionally, the Complainant provided no evidence to refute the Custodian’s certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 2 seeking a report of outstanding checks issued by the City older than six (6) months, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

**Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request Item No. 1 seeking Bank Statement of Escrow Accounts for January 2017. N.J.S.A. 47:1A-6. Specifically, the Custodian stated in response and subsequently certified in the Statement of Information that he had not yet received the record, and he was under no obligation to provide a record that yet to be created at the time of the request. See Goeckel v. Chatham Borough Police Dep't (Morris), GRC Complaint No. 2013-356 (July 2014), Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
  
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request Item No. 2 seeking a report of outstanding checks issued by the City older than six (6) months, because the Custodian certified in the Statement of Information that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado  
Staff Attorney

June 18, 2019