



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

April 26, 2016 Government Records Council Meeting

Luis F. Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2015-114

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 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:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s November 4, 2014 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by unnecessarily extending the response time by over one-hundred (100) business days, only to respond ultimately that no records existed. However, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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 26th Day of April, 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: May 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2015-114

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all correspondence (e-mails, memoranda, text messages, *etc.*) that occurred to/from, President Farahi, Phil Connelly, Jeffrey Toney, any deans, any chairs of the Nursing Department, Faruque Chowdhury, and any members of Kean University's ("Kean") Board of Trustees ("Board") on issues related to Kean establishing a relationship with the International Medical College ("IMC") and/or the International Nursing College ("INC") between 2010 and present.³

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: November 4, 2014
Response Made by Custodian: November 5, 2014
GRC Complaint Received: April 16, 2015

Background⁴

Request and Response:

On November 4, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 5, 2014, the Custodian responded in writing, seeking an extension of time until November 20, 2014.

On November 20, 2014, the Custodian responded in writing, advising that an extension until December 4, 2014, would be necessary to process the request. On December 4, 2014, the Custodian responded in writing, advising that an extension until December 18, 2014, would be necessary. On December 18, 2014, the Custodian responded in writing, seeking an extension until January 13, 2015. On January 13, 2015, the Custodian responded in writing, advising that

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela Velez.

³ This request was the result of several clarifications provided by the Complainant between October 27, and November 4, 2014.

⁴ 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.

an extension until January 28, 2015, would be necessary. On January 28, 2015, the Custodian responded in writing, seeking an extension until February 12, 2015. On February 12, 2015, the Custodian responded in writing, advising that an extension until February 26, 2015, would be necessary. On February 26, 2015, the Custodian responded in writing, seeking an extension until March 12, 2015. On March 12, 2015, the Custodian responded in writing, advising that an extension until March 26, 2015, would be necessary. On March 26, 2015, the Custodian responded in writing, seeking an extension until April 9, 2015. On April 9, 2015, the Custodian responded in writing, advising that an extension until April 23, 2015, would be necessary.

Denial of Access Complaint:

On April 16, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the reasonableness of the Custodian’s repeated extensions of time, which expanded the response time over five (5) months. The Complainant contended that the Custodian knowingly and willfully violated OPRA by utilizing the extension process to deny access to responsive records.

Supplemental Responses

On April 23, 2015, the Custodian responded in writing, stating that no records responsive to the subject OPRA request existed.

Statement of Information:

On May 8, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 4, 2014. The Custodian affirmed that she initially had to review the request, which took some time due to its complexity. The Custodian certified that, after seeking a second extension of time, she forwarded the request to each individual identified therein. The Custodian certified that she received responses from each individual over the next several months.⁵ The Custodian averred that she thoroughly reviewed the responses and determined that no Board records existed. Further, the Custodian certified that on April 20, 2015, as a precaution, she forwarded the request to the Board Executive Director for confirmation that no records existed. The Custodian certified that the Executive Director confirmed at that time that no records existed. The Custodian responded accordingly to the Complainant in writing on April 23, 2015.

The Custodian contended that her multiple requests for an extension were reasonable. NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian certified that the Complainant’s OPRA request sought multiple forms of correspondence, all spanning a period of nearly five (5) years, between six (6) specific individuals and several unidentified persons. The Custodian asserted that the Complainant’s request was not specific enough, despite several prior attempts to clarify same. Further, the Custodian noted that she timely sought additional extensions on multiple occasions. The Custodian also contended that the Complainant simultaneously submitted five (5) related OPRA

⁵ The Custodian noted that she received responses from the named individuals regarding multiple OPRA requests over the same time period.

requests that added to the total burden of responding to the request at issue here. The Custodian noted that she reviewed all five (5) requests simultaneously to avoid wasting resources.

The Custodian asserted that, given the facts, it is not surprising that she needed nearly six (6) months to complete a thorough search. The Custodian asserted that, based on the foregoing, she properly responded to the subject OPRA request.

Additional Submissions:

On May 11, 2015, the Complainant disputed that responses from the individuals identified in the OPRA request should take so long. The Complainant questioned why the individuals could not quickly recall correspondence regarding a school based in Pakistan. The Complainant contended that these individuals should have quickly responded, advising that no records existed, especially given that such communications would likely be rare in the first instance. The Complainant requested that the GRC require the Custodian to certify to the steps she took to compel the individuals to respond to his OPRA request.

On May 19, 2015, the Custodian's Counsel e-mailed the GRC, advising that the Custodian made no representation as to the amount of time it took the identified persons to provide her with responses to the Complainant's OPRA request. Counsel further asserted that the Complainant's assumption was based on simple requests; however, the Complainant submitted "hundreds of OPRA requests" on a weekly basis that were often extremely complex.

On the same day, the Complainant responded, arguing that Custodian's Counsel erroneously asserted that he submits hundreds of OPRA requests on a weekly basis. The Complainant further reiterated his disbelief that it would take all identified persons such a long time to advise the Custodian that no records existed.

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to provide respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not agree to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the

Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. In rendering the decision, the Council cited as legal authority Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep’t of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009).

Although extensions are rooted in well-settled case law, the Council need not unquestioningly find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant matter, the Custodian sought multiple extensions for the Complainant’s November 4, 2014 OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
November 5, 2014	November 20, 2014	So that the OPRA request may “be appropriately processed.”
November 20, 2014	December 4, 2014	So that the OPRA request may “be appropriately processed.”
December 4, 2014	December 18, 2014	“[T]o process your clarified request.”
December 18, 2014	January 13, 2015	So that the OPRA request may “be appropriately processed” and as a result of Kean’s closure due to holiday break.
January 13, 2015	January 28, 2015	So that the OPRA request may “be appropriately processed.”
January 28, 2015	February 12, 2015	So that the OPRA request may “be appropriately processed.”
February 12, 2015	February 26, 2015	So that the OPRA request may “be appropriately processed.”
February 26, 2015	March 12, 2015	So that the OPRA request may “be appropriately processed.”
March 12, 2015	March 26, 2015	So that the OPRA request may “be appropriately processed.”
March 26, 2015	April 9, 2015	So that the OPRA request may “be appropriately processed.”
April 9, 2015	April 23, 2015	So that the OPRA request may “be appropriately processed.”

The subject OPRA request sought various types of correspondence to/from a number of individuals over approximately a five (5) year period regarding Kean’s proposed relationship with IMC and INC. The Custodian extended the response time on eleven (11) occasions for a total of over one-hundred (100) business days (loosely accounting for holidays). As noted above, a requestor’s approval is not required for a valid extension. However, the GRC notes that the record here is unclear whether or not the Complainant agreed to the extensions prior to filing the instant complaint: neither party included correspondence indicating that the Complainant either disputed the extensions or agreed.⁶

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to respond

⁶ In Ciccarone, the complainant allowed for a few extensions before denying the custodian any additional time. Although the complainant’s acquiescence to extensions was a mitigating factor there, it was not the only factor on which the GRC relied to determine whether the requests for extension were reasonable.

to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁷

The evidence of record indicates that, based on the nature of the OPRA request, the Custodian was working with multiple individuals to respond to the request. However, neither the Custodian nor anyone associated with the search for responsive records provided a certification recounting the nature of the search. It should be noted that the Custodian certified in the SOI that the request at issue here was one of six (6) requests for records regarding a similar subject and that she reviewed all requests at the same time for expediency purposes. The Custodian ultimately denied access to the subject OPRA request on the basis that no records exist.⁸

From the Custodian's receipt of the OPRA requests, she immediately sought eleven (11) and eight (8) business day extensions, respectively. The Custodian had nearly a month of business days to respond to the request after two (2) extensions. However, the Custodian continued to extend the time frame an additional eighty (80) or more business days thereafter. The Custodian mostly provided vague reasons for the extensions; thus, the record does not sufficiently prove any particularly harmful extenuating circumstances that would have warranted such an extensive delay. Based on the evidence of record, the GRC finds that extending the response time for the OPRA requests to the extent demonstrated in the instant matter was clearly excessive and flies in the face of OPRA's mandate to "promptly comply" with a records request and to grant or deny access "as soon as possible . . ." N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the Complainant's November 4, 2014 OPRA request, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

Knowing & 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 "[i]f 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).

⁷ "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

⁸ The GRC notes that the Complainant did not take issue with the denial; rather, the Complainant disputed the Custodian's multiple extensions over a six (6) month period.

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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by unnecessarily extending the response time by over one-hundred (100) business days, only to respond ultimately that no records existed. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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 Custodian did not bear her burden of proof that she timely responded to the Complainant's November 4, 2014 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by unnecessarily extending the response time by over one-hundred (100) business days, only to respond ultimately that no records existed. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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: Frank F. Caruso
Communications Specialist/Resource Manager

March 22, 2016⁹

⁹ This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.