



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

September 30, 2014 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2014-186

v.

State Ethics Commission
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 Supplemental 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 responded to the Complainant’s OPRA request in a timely manner on the seventh (7th) business day following receipt of the request. As such, paragraphs number one and number three of the Council’s July 29, 2014 Final Decision are struck from said decision.

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 30th Day of September, 2014

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 3, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting

Luis Rodriguez¹
Complainant

GRC Complaint No. 2014-186

v.

State Ethics Commission²
Custodial Agency

Records Relevant to Complaint: Any and all correspondence between Peter Tober and Dawood Farahi, Phillip Connelly, Michael Tripodi and/or Geri Benedetto that mentioned Luis Rodriguez, formerly of Kean University, that occurred from June 2010 to April 13, 2014 and in which Mr. Rodriguez's name does not appear as a recipient of said correspondence.

Custodian of Record: Diane L. Camiso, Esq.
Request Received by Custodian: April 13, 2013
Response Made by Custodian: April 23, 2013
GRC Complaint Received: April 30, 2014

Background³

July 29, 2014 Council Meeting:

At the July 29, 2014 public meeting, the Government Records Council ("Council") considered the July 22, 2014 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, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i),

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela Velez.

³ 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.

and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Because the Custodian certified that said records are exempt from disclosure as confidential records related to a State Ethics Commission investigation pursuant to N.J.A.C. 19:61-3.1 et seq., applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to the Complainant's request within the statutorily mandated seven (7) business days, 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 an unreasonable denial of access under the totality of the circumstances.

Procedural History:

On July 31, 2014, the Council distributed its Final Decision to all parties. On August 1, 2014, the Custodian's Counsel contacted the GRC stating that the Council's Final Decision contained a mistake in that the GRC failed to take into account the Good Friday holiday when calculating the statutorily mandated business days from the date the Custodian received the request until the date of response.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10(a), the Council, "at its own discretion, may reconsider any decision it renders." Id. The GRC acknowledges that it made a mistake in counting the business days from the date the request was received by the Custodian until the date the Custodian responded in writing to the request. The mistake led to the erroneous conclusion that the Custodian failed to respond to the request in a timely manner which resulted in a "deemed denial" of the request. The GRC thus reconsiders this matter of its own volition in order to amend the Council's July 29, 2014 Final Decision.

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id.

In its July 29, 2014 Final Decision the Council found that the Custodian received the Complainant's request on April 13, 2014, but did not provide a written response until April 23,

2014, which was the eighth (8th) business day following receipt of the request. The Council therefore found that the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6.

Upon reconsideration, the GRC has determined that April 18, 2014 was Good Friday, a State holiday. However, April 18, 2014 was counted as business day number five (5) of eight (8) business days between the date of request and the date of response. Because April 18, 2014 was a State holiday it should not have been counted within the statutorily mandated seven (7) business day period. Therefore, by recalculating the period between date of request and date of response taking the holiday into account, the GRC has determined that the Custodian responded to the Complainant's request on the seventh (7th) business day. As such, the Custodian did respond to the Complainant's OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-6; therefore, there was no "deemed" denial of said request.

Accordingly, the Custodian responded to the Complainant's OPRA request in a timely manner on the seventh (7th) business day following receipt of the request. As such, paragraphs number one and number three of the Council's July 29, 2014 Final Decision are struck from said decision.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian responded to the Complainant's OPRA request in a timely manner on the seventh (7th) business day following receipt of the request. As such, paragraphs number one and number three of the Council's July 29, 2014 Final Decision are struck from said decision.

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

September 23, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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FINAL DECISION

July 29, 2014 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2014-186

v.

State Ethics Commission
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified that said records are exempt from disclosure as confidential records related to a State Ethics Commission investigation pursuant to N.J.A.C. 19:61-3.1 et seq., applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to the Complainant’s request within the statutorily mandated seven (7) business days, 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 an 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 29th Day of July, 2014

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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2014-186

v.

**State Ethics Commission²
Custodial Agency**

Records Relevant to Complaint: Any and all correspondence between Peter Tober and Dawood Farahi, Phillip Connelly, Michael Tripodi and/or Geri Benedetto that mentioned Luis Rodriguez, formerly of Kean University, that occurred from June 2010 to April 13, 2014 and in which Mr. Rodriguez's name does not appear as a recipient of said correspondence.

Custodian of Record: Diane L. Camiso, Esq.
Request Received by Custodian: April 13, 2013
Response Made by Custodian: April 23, 2013
GRC Complaint Received: April 30, 2014

Background³

Request and Response:

On April 13, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 23, 2013, the eighth (8th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the records responsive to the Complainant's request are exempt from disclosure as inter-agency advisory, consultative, or deliberative ("ACD") material per N.J.S.A. 47:1A-1.1. The Custodian informed the Complainant that the requested records were also exempt under N.J.S.A. 47:1A-5 and N.J.S.A. 47:1A-9(a) which incorporate exemptions found in regulations.

Denial of Access Complaint:

On April 30, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that he filed his request with the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela Velez.

³ 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.

Custodian on April 13, 2014, and that the Custodian denied his request on April 23, 2014. The Complainant states that the Custodian denied his request because she asserted it was exempt from disclosure as ACD material. The Complainant states that although the Custodian asserted the requested records were exempt as ACD material, the Custodian did not prove the material was ACD. The Complainant further states that it is reasonable to believe that there is factual material in the correspondence. The Complainant urges the GRC to overturn the Custodian's decision (presumably, in the response). The Complainant cites Rodriguez v. Kean University, GRC Complaint No. 2013-71 (Interim Order December 2013) in support of his argument. In this matter the GRC ordered an *in camera* examination of the responsive records, which the custodian asserted were exempt from disclosure as part of an ongoing investigation. Id.

Statement of Information:

On June 6, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that the Complainant filed his request with the Custodian on April 13, 2014, and that the Custodian denied the request on April 23, 2014.

The Custodian certifies that the records responsive to the Complainant's request consist of a thread of three (3) e-mails between Michael Tripodi, Kean University Ethics Officer, and Peter Tober, the Executive Director of the State Ethics Commission ("Commission") dated March 26, 2013. The Custodian further certifies that the e-mail thread is a consultation between the Kean Ethics Officer and the Commission regarding a Commission investigation.

The Custodian certifies that the responsive records are exempt from disclosure because they are records related to a Commission investigation and confidential pursuant to N.J.A.C. 19:61-3.1 et seq. and N.J.S.A. 47:1A-9(a). The Custodian certifies that any preliminary investigation of any alleged ethics violation, whether conducted by Commission staff or a State agency, shall be considered confidential pursuant to N.J.A.C. 19:61-3.1(a)(3). The Custodian also certifies that even after the conclusion of an ethics investigation the Commission must consider several factors and balance the requester's need against the public interest to maintain the confidentiality of the files.

The Custodian also certifies that the responsive records are exempt from disclosure because, as consultative material between two agencies related to an ethics investigation, the records constitute ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian cites In re Liquidation of Integrity Ins., 165 N.J. 75 (2000) and Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009), among other cases in support of her argument. The Custodian certifies that the confidentiality provisions of the Commission's regulations further emphasize the need for the ACD exemption and the Custodian's withholding of the documents requested by the Complainant.

Additional Submissions:

On June 13, 2014 the Complainant e-mailed the GRC to urge the GRC to conduct an *in camera* examination of the requested records to determine whether the records divulge ACD material.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, there is no dispute between the parties that the Custodian received the Complainant's request on April 13, 2014, but did not provide a written response until April 23, 2014. The Custodian therefore failed to respond to the OPRA request until the eighth (8th) business day following receipt of the request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

OPRA also provides:

[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order."

⁴ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

N.J.S.A. 47:1A-9(a).

The Custodian certified that the responsive record is an e-mail thread dated March 26, 2013 between the Kean University Ethics Officer and the Executive Director of the State Ethics Commission which contained consultative material between the two agencies related to an ethics investigation. The Custodian certified that the responsive records are exempt from disclosure because they are confidential pursuant to N.J.A.C. 19:61-3.1 *et seq.*

With respect to a preliminary ethics investigation, N.J.A.C. 19:61-3.1(a)(3) provides that, “[a]ny preliminary investigation of an alleged ethics violation, whether conducted by Commission staff or a State agency, shall be confidential.” N.J.A.C. 19:61-3.1(c)(3) goes on to provide that, “[t]he contents of the Commission’s investigative file are confidential and shall not be released except upon the authorization of the Commission, or pursuant to court order or administrative rule.” However, even after a final determination is rendered, the State Ethics Commission still has an obligation to conduct a balancing test to see if there are sufficient factors militating toward disclosure, as is clear in the regulation:

After the final determination of a matter by the Commission and the expiration of any time for appeal, the Commission shall consider requests for information related to the completed matter. The Commission shall consider and determine whether the requester has a particularized need for the contents of the file and has established an inability to obtain the requested information from other sources. In its consideration, the Commission shall balance the requester’s need against the public interest to maintain the confidentiality of the files.

N.J.A.C. 19:61-3.1(c)(5)

The GRC does not know the stage of the ethics investigation, but if still a preliminary investigation, the requested records are confidential and not subject to disclosure pursuant to N.J.A.C. 19:61-3.1(c)(3). And if the investigation has concluded, per N.J.A.C. 19:61-3.1(c)(5) the records may only be disclosed if it has been determined by the Commission that sufficient factors preponderate toward disclosure, which is not the case here based upon the Custodian’s certification.

Therefore, because the Custodian certified that said records are exempt from disclosure as confidential records related to a State Ethics Commission investigation pursuant to N.J.A.C. 19:61-3.1 *et seq.*, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records.

Because the Custodian lawfully denied the Complainant access pursuant to N.J.A.C. 19:61-3.1 *et seq.* and N.J.S.A. 47:1A-9(a), it is unnecessary for the Council to determine whether the requested items are also exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1.

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).

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 (Berg); 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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to the Complainant’s request within the statutorily mandated seven (7) business days, 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 an 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 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Because the Custodian certified that said records are exempt from disclosure as confidential records related to a State Ethics Commission investigation pursuant to N.J.A.C. 19:61-3.1 et seq., applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to the Complainant's request within the statutorily mandated seven (7) business days, 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

July 22, 2013