



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2015-174

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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’s failure to provide the contract exhibits in response to the Complainant’s August 12, 2014 OPRA request results in a “deemed denial” of access to the record. N.J.S.A. 47:1A-5(i); Quirk v. Nutley Bd. of Educ. (Essex), GRC Complaint No. 2007-187 (October 2007). However, the Council declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released the omitted exhibits on July 9, 2015.
2. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide timely a complete and accurate record in response to the Complainant’s August 12, 2014 OPRA request. Notwithstanding the Custodian’s “deemed denial,” the record demonstrates that her attempts to obtain and provide the missing parts of the record dissuade a finding of a knowing and willful violation of OPRA. Also, the evidence of record indicates that Mr. Thorn was heavily involved with the request. Although the actions of Mr. Thorn appear negligent and heedless in the original production of the responsive record and during the Custodian’s attempts to recover the omitted exhibits, his actions do not appear to rise to the level of a knowing and willful violation.

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 31st Day of January, 2017

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: February 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-174

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “I request a copy of any and all additions and/or final amendments to the final and fully executed contract between Gourmet Dining and Kean University that resulted from Gourmet successfully winning [*sic*] the dining services contract from its bid for K07-3-27-5.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: August 12, 2014

Response Made by Custodian: August 22, 2014; September 5, 2014; July 9, 2015

GRC Complaint Received: June 15, 2015

Background³

Request and Response:

On August 11, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking the above-mentioned records. On August 22, 2014, the Custodian responded in writing, seeking an extension of time to respond to the Complainant’s request to until September 5, 2014.

On September 5, 2014, the Custodian responded in writing, providing twenty-three (23) pages of responsive documents. On April 20, 2015, the Complainant e-mailed the Custodian, claiming that the provided contract was missing some identified exhibits and requested their delivery. On April 22, 2015, the Complainant notified the Custodian that he gave an associate permission to receive and view the missing record on the Complainant’s behalf. The Complainant inquired further as to the status of the missing exhibits on May 13, 2015.

¹ No legal representation listed on record.

² Represented by Angela Velez, DAG.

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.

Denial of Access Complaint:

On June 15, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he received the responsive record on September 5, 2014, but did not realize that the record was allegedly incomplete until on or around April 20, 2015, when he notified the Custodian via e-mail.

The Complainant then claimed that the Custodian failed to respond when he notified her in writing that the responsive record was incomplete, despite providing the Custodian additional notice on April 22, 2015, and May 13, 2015. The Complainant therefore asserted that the Custodian knowingly and willfully violated OPRA by failing to produce a full and complete record in response to his OPRA request.

Statement of Information:

On July 9, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 12, 2014. The Custodian then certified that she sought an extension of time to respond to until September 5, 2014. On August 27, 2014, the Custodian certified that she received responsive records from George Thorn (“Mr. Thorn”), Director of University Purchasing. On September 5, 2014, the Custodian provided the responsive record consisting of twenty-three (23) pages to the Complainant via e-mail.

The Custodian certified that she received an e-mail from the Complainant on April 20, 2015, who claimed that the provided record in this matter was incomplete. Upon review of the contract provided to the Complainant on September 5, 2014, the Custodian conceded that the provided contract was missing exhibits that should have been included. On April 24, 2015, the Custodian reached out to Mr. Thorn, inquiring about the missing records. The Custodian sent an additional inquiry on April 29, 2015, and received documents by hand on May 1, 2015. However, the Custodian informed Mr. Thorn that the provided records were not responsive to the OPRA request.

On May 13, 2015, the Custodian reached out to Mr. Thorn by e-mail regarding the missing sections of the record. When the Custodian received no response, she certified that she reached out to Mr. Thorn by telephone on June 16, 2015. During the conversation, Mr. Thorn asserted that all responsive records had already been provided but that he would look into the matter again. On June 22, 2015, the Custodian certified that she received additional documents by hand from Mr. Thorn. However, the Custodian certified that these documents were not responsive as well. The Custodian reached out to Mr. Thorn on June 25, 2015, and again on July 1, 2015, after not receiving a reply.

The Custodian certified that she reached out to Associate Counsel Jennifer Soyka (“Ms. Soyka”) regarding the missing sections of the records. The Custodian then certified that Ms. Soyka located the missing records on or around that time. Mr. Thorn also confirmed that those records were responsive to the request. On July 9, 2015, the Custodian provided an additional response to the Complainant and attached the missing contract exhibits.

Additional Submissions:

On July 10, 2015, the Complainant responded to the Custodian's SOI via e-mail. The Complainant asked the GRC to consider penalties against Mr. Thorn for knowingly and willfully violating OPRA based on the actions described by the Custodian. The Complainant noted that the GRC can impose a penalty on employees other than the Custodian based upon the GRC's "Custodian's Handbook."

Analysis

Sufficiency of Response

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 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 Quirk v. Nutley Bd. of Educ. (Essex), GRC Complaint No. 2007-187 (October 2007), the complainant sought a contract agreement from the custodian. The custodian provided the responsive record entitled, "Terms and Conditions of Network Participation." Id. The complainant later alleged that she received an additional responsive record entitled "School Agreement," from a separate source sometime after receiving the custodian's response. Id. The complainant noted that the "School Agreement" was signed and dated by the custodian prior to filing the OPRA request, suggesting that the custodian should have had possession of the record when requested. Id. Calling the omission an "oversight," the custodian claimed not to have realized that the document was not attached to the packet provided to the complainant. Id. The Council found that, although the omission "may have been inadvertent, the Custodian is still required to make prompt and accurate responses to a requestor." Id. The Council held that the custodian's omission resulted in a "deemed" denial of access. Id.

In the instant matter, the facts coincide with those in Quirk, GRC 2007-187. The Custodian admitted that the provided contract was missing identified exhibits that should have been included in the original response. Id. Like the custodian in Quirk, the Custodian asserted that the omission was inadvertent. GRC 2007-187. However, the Custodian remains responsible for providing a timely and complete response to valid OPRA requests. Id.; N.J.S.A. 47:1A-5(i).

Therefore, the Custodian's failure to provide the contract exhibits in response to the Complainant's August 12, 2014 OPRA request results in a "deemed denial" of access to the record. N.J.S.A. 47:1A-5(i); Quirk, GRC 2007-187. However, the Council declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released the omitted exhibits on July 9, 2015.

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 (*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)).

In the instant matter, the Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide timely a complete and accurate record in response to the Complainant’s August 12, 2014 OPRA request. Notwithstanding the Custodian’s “deemed denial,” the record demonstrates that her attempts to obtain and provide the missing parts of the record dissuade a finding of a knowing and willful violation of OPRA. Also, the evidence of record indicates that Mr. Thorn was heavily involved with the request. Although the actions of Mr. Thorn appear negligent and heedless in the original production of the responsive record and during the Custodian’s attempts to recover the omitted exhibits, his actions do not appear to rise to the level of a knowing and willful violation.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to provide the contract exhibits in response to the Complainant’s August 12, 2014 OPRA request results in a “deemed denial” of access to the record. N.J.S.A. 47:1A-5(i); Quirk v. Nutley Bd. of Educ. (Essex), GRC Complaint No. 2007-187 (October 2007). However, the Council declines to order disclosure in this instance because the evidence of record reflects, and the

Complainant did not demonstrate to the contrary, that the Custodian released the omitted exhibits on July 9, 2015.

2. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide timely a complete and accurate record in response to the Complainant's August 12, 2014 OPRA request. Notwithstanding the Custodian's "deemed denial," the record demonstrates that her attempts to obtain and provide the missing parts of the record dissuade a finding of a knowing and willful violation of OPRA. Also, the evidence of record indicates that Mr. Thorn was heavily involved with the request. Although the actions of Mr. Thorn appear negligent and heedless in the original production of the responsive record and during the Custodian's attempts to recover the omitted exhibits, his actions do not appear to rise to the level of a knowing and willful violation.

Prepared By: Samuel A. Rosado
Staff Attorney

January 24, 2017