



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

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. 2015-203

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 failed to establish that the complaint should be reconsidered based on mistake. The GRC notes that while the Custodian did in fact respond to the request within the statutorily-mandated seven (7) business days required by OPRA, the Custodian nonetheless failed to respond *immediately* in writing to the Complainant’s OPRA request, which sought immediate access records. Therefore, the Council upholds the underlying finding that the Custodian’s failure to respond in writing immediately resulted in a “deemed” denial of the Complainant’s OPRA request, pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 31<sup>st</sup> 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**

*Reconsideration*

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

**Luis Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-203**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Any and/or all contracts Kean University had with the town of Elizabeth (NJ) to provide IT/data processing/telecommunications services to the town during the years 2010-2012 inclusive.

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** March 30, 2015

**Response Made by Custodian:** April 9, 2015; April 23, 2015; May 7, 2015; May 21, 2015; June 4, 2015; June 11, 2015; June 25, 2015; July 9, 2015

**GRC Complaint Received:** July 8, 2015

**Background**

**June 28, 2016 Council Meeting:**

At its June 28, 2016 public meeting, the Council considered the June 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, found that:

1. 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 immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's March 30, 2015 OPRA request, based on unwarranted and

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

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

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). However, the GRC 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 responsive records to the Complainant on July 9, 2015.

3. The Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by failing to respond immediately to the Complainant's OPRA request and unnecessarily extending the response time by over seventy (70) business days. 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. Additionally, the Custodian did disclose existing responsive records. 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.

#### Procedural History:

On June 30, 2016, the Council distributed its Final Decision to all parties. On July 14, 2016, the Custodian filed a request for reconsideration of the Council's June 28, 2016 Final Decision, alleging a mistake.<sup>3</sup> The Custodian argued that the GRC incorrectly found that the Custodian's initial response occurred on the eighth (8<sup>th</sup>) business day. The Custodian noted that Good Friday in 2015 fell on Friday, April 3, which was four (4) days after receipt of the request and within the seven-business-day response period. As Good Friday is a recognized holiday, the seventh (7<sup>th</sup>) business day to respond was April 9, 2015.

#### Analysis

#### Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

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<sup>3</sup> Due to receiving the Custodian's request for reconsideration during the same period in which the GRC was processing the Complainant's separate request for reconsideration, filed on July 9, 2016 and objections filed by the Custodian on July 22, 2016, the GRC did not process this request until an inquiry by the Custodian on November 17, 2016. The GRC adjudicated and denied the Complainant's separate request for reconsideration at its November 15, 2016 Council meeting.

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Order, dated June 30, 2016, on July 14, 2016, nine (9) days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Custodian noted that the GRC did not consider the Good Friday holiday in 2015 when noting that the Custodian's initial response occurred on the eighth (8<sup>th</sup>) business day. While the GRC acknowledges that Good Friday is a recognized holiday, and therefore finds that the Custodian's initial response occurred on the seventh (7<sup>th</sup>) business day, it notes that the request (one for immediate access records) is nonetheless still deemed denied, as the Custodian failed to respond *immediately*. Therefore, the GRC's finding on that matter stands.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Custodian has failed to establish that the complaint should be reconsidered based on mistake. The GRC notes that while the Custodian did in fact respond to the request within the statutorily-mandated seven (7) business days required by OPRA, the Custodian nonetheless failed to respond *immediately* in writing to the Complainant's OPRA request, which sought immediate access records. Therefore, the Council upholds the underlying finding that the Custodian's failure to respond in writing immediately resulted in a “deemed” denial of the Complainant's OPRA request, pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). *See Cody v. Middletown Twp. Public Schools*, GRC Complaint No. 2005-98 (December 2005). *See also* and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). Thus, the Custodian's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian failed to establish that the complaint should be reconsidered based on mistake. The GRC notes that while the Custodian did in fact respond to the request within the statutorily-mandated seven (7) business days required by OPRA, the Custodian nonetheless failed to respond *immediately* in writing to the Complainant's OPRA request, which sought immediate access records. Therefore, the Council upholds the underlying finding that the Custodian's failure to respond in writing immediately resulted in a "deemed" denial of the Complainant's OPRA request, pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Husna Kazmir  
Staff Attorney

January 24, 2017



State of New Jersey  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**June 28, 2016 Government Records Council Meeting**

Luis F. Rodriguez  
Complainant

v.

Kean University  
Custodian of Record

Complaint No. 2015-203

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 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’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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s March 30, 2015 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). However, the GRC 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 any responsive records to the Complainant on July 9, 2015.
3. The Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by failing to respond immediately to the Complainant’s OPRA request and unnecessarily extending the response time by over seventy (70) business days. 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. Additionally, the Custodian did disclose existing responsive records. 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 28<sup>th</sup> Day of June, 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: June 30, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2016 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-203**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Any and/or all contracts Kean University had with the town of Elizabeth (NJ) to provide IT/data processing/telecommunications services to the town during the years 2010-2012 inclusive.

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** March 30, 2015

**Response Made by Custodian:** April 9, 2015; April 23, 2015; May 7, 2015; May 21, 2015; June 4, 2015; June 11, 2015; June 25, 2015; July 9, 2015

**GRC Complaint Received:** July 8, 2015

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

**Request and Response:**

On March 30, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 9, 2015, the Custodian responded in writing, advising the Complainant that his request requires an extension of time “to be appropriately processed,” pursuant to N.J.S.A. 47:1A-5(i). The Custodian extended the timeframe until April 23, 2015.

On April 23, 2015, the Custodian wrote to the Complainant, advising him that his request required an additional extension of time “to be appropriately processed” and extending the timeframe until May 7, 2015. On May 7, 2015, the Custodian wrote to the Complainant, repeating her earlier assertions and extending the timeframe until May 21, 2015. On May 21, 2015, the Custodian wrote to the Complainant, reiterating her earlier letters and extending the timeframe until June 4, 2015. On June 4, 2014, the Custodian again wrote to the Complainant in identical format and “extended the timeframe until June 11, 2015. The Custodian once again

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

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

<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.

wrote to the Complainant on June 11, 2015, repeating her earlier letters and citing a new date of June 25, 2015. On that day, the Custodian wrote to the Complainant, repeating her earlier letters and extending the response time to July 9, 2015.

On July 9, 2015, after the Complainant filed a Denial of Access Complaint, the Custodian responded in writing, advising the Complainant that “government records responsive to your request total 25 pages” and that the documents were being sent, at no cost, via e-mail.

#### Denial of Access Complaint:

On July 6, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Kean University (“Kean”) had “extended responding to this request and has continued to extend it.” As of the filing of his Complaint, the Complainant stated that the last response he had received was on June 30, 2015, when Kean requested an extension to July 9, 2015. The Complainant argued that the Custodian had violated OPRA’s immediate access provision in N.J.S.A. 47:1A-5(e), which includes contracts, because she had not provided the contracts immediately or within a reasonable time period.

#### Statement of Information:

On August 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 30, 2015. She certified that the search for responsive records started with forwarding the request to Felice Vasquez, Associate Vice President and Special Counsel, that same day. The Custodian then noted that the Complainant thereafter filed four additional OPRA requests “on a related subject matter,” received by Kean on April 7, 2015, and forwarded to George Thorn, Director of University Purchasing. The Custodian certified that an extension letter was sent to the Complainant via e-mail on April 9, 2015, as Ms. Vasquez had advised that “research was underway to identify the responsive documents and additional time was required to complete a search.”

The Custodian certified that “a follow up message” was sent to Ms. Vazquez on April 23, 2015, seeking an update on the status of the requested contracts. The Custodian stated that Ms. Vazquez advised at that time that “she was facilitating the search for responsive records with the Executive Vice President for Operations’ Office and that she and Ms. JoAnn Pobuta were “contacting all related internal and external offices as part of the search.” Thereafter, an additional extension letter was sent to the requestor.

The Custodian stated that “it was still unclear [following her letter] whether or not executed contracts existed for the time period requested” and that a follow-up e-mail was sent to George Thorn on April 30, 2015, seeking “related purchase orders” for the time period. The Custodian certified that extension letters were sent to the Complainant on May 7, May 21, and June 4, 2015, via e-mail “in order to accommodate the search for responsive documents as none had been received.”

The Custodian certified that during a June 10, 2015 meeting with Ms. Vasquez and Audrey Kelly, Executive Director in the Office of the President and the Board of Trustees, “it was determined that contracts with the City of Elizabeth did exist.” The Custodian stated that Ms. Vasquez and Ms. Kelly then advised that the files would be pulled from storage, reviewed, and copies of the contracts would be made and forwarded to the Office of Human Resources. The Custodian averred that a “final extension letter” was sent to the Complainant via e-mail on June 25, 2015, as the contracts had not yet been received by that date.

The Custodian averred that her office received the contracts on July 8, 2015. She certified that after reviewing the documents, it was determined that portions of the copies provided were incomplete. Thereafter, a follow-up message was sent to Ms. Pobuta in order to obtain complete copies. The Custodian certified that Ms. Pobuta forwarded copies of the contracts in full on July 9, 2015. The Custodian certified that she thereafter responded to the Complainant’s request with a “disposition letter and 25 pages of responsive government records,” provided via e-mail.

The Custodian thereafter argued that no unlawful denial of access had occurred, as the requested records were provided on July 9, 2015 and within the extended time to respond. Therefore, the “issue in the complaint is moot.” *Citing L.R. v. Camden Bd. of Educ. Custodian*, 2012 N.J. Super. Unpub. LEXIS 1140, \*6-7 (App. Div. May 23, 2012). The Custodian argued in the alternative that, “even if access were denied,” it was not done knowingly or willfully. The Custodian asserted that she undertook an extensive and good faith search for the requested records upon receipt of the OPRA request and promptly provided the Complainant with said records upon receipt. The Custodian argued that she “kept the Complainant apprised of the status” of his request.

The Custodian argued that, while N.J.S.A. 47:1A-5 “generally requires that a custodian grant access or deny a request no later than seven business days” after receipt, OPRA includes exceptions to this general rule. The Custodian noted that N.J.S.A. 47:1A-5(i) provides that the exceptions rely on reasonableness and include considerations of whether the record is not available, in storage or archived, or if a request would substantially disrupt agency operations. *See also N.J. Builders Ass’n v. N.J. Council on Affordable Housing*, 300 N.J. Super. 166, 180 (2007).

The Custodian asserted that the Complainant in the instant matter requested “expired contracts that had been sent to storage,” necessitating an extended response time to allow the Custodian to locate the records, retrieve them from storage, and review them for completeness.

#### Additional Submissions:

On January 22, 2016, the Complainant wrote to the GRC in response to the Custodian’s SOI. The Complainant stated that the Custodian’s response indicated that others at Kean were not responsive to the Custodian’s request to forward the pertinent documents, highlighting the Custodian’s statements regarding forwarding the request to Felice Vasquez on March 30, 2015; forwarding the request to George Thorn on April 7, 2015; sending a follow-up message to Ms. Vasquez on April 23, 2015; sending a follow-up message to Mr. Thorn on April 30, 2015 and so forth.

The Complainant, noting the Custodian's SOI mentioned that the responsive records were in storage, additionally wonders why Kean's staff needed three to four weeks (6/10/2015 to 7/8/2015) to provide the Custodian with the contracts. The Complainant opined, "that seems much too long to retrieve documents in storage unless those documents are stored off-site (and even then, retrieval should not take so long.)" The Complainant suggested that Kean had not provided evidence to the contrary and that the GRC should assume that the documents were on-site. The Complainant suggested that the delay in receiving records could be "due to a lack of concern of some of its staff in meeting the requirements of OPRA, particularly for contracts."

The Complainant additionally argued that "the GRC has in its power the ability to sanction employees other than the custodian for willful and knowing violation[s] of OPRA" and suggested that such sanctions would be appropriate in these circumstances. The Complainant also disputed the Custodian's reliance on L.R., 300 N.J. Super. 180, as supportive of the argument that the Complainant's complaint is "moot." The Complainant argued that the decision in L.R. was primarily concerned with the collection of attorney fees, which are not at issue in his case.

The Complainant also noted that his submission of a separate and similar request to the City of Elizabeth "in mid-to-late June" due to Kean "taking too long to provide . . . contracts which, according to OPRA, should have been provided immediately" was a separate issue from the instant matter. He argued that "it stands OPRA on its head if a request is left unfilled because the requestor could get records from another agency. A requestor should not have to know which agency will fill a request faster than another agency." The Complainant asked the GRC to find that Kean had violated OPRA by failing to provide the requested contracts in a timely manner.

## Analysis

### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).<sup>[1]</sup> 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also

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<sup>[1]</sup> 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.

results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>[2]</sup> See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records.

Here, the Custodian’s initial response to the Complainant’s March 30, 2015 request, advising him that an extension was necessary in order to locate any responsive records, occurred on April 9, 2015, the eighth (8<sup>th</sup>) business day following receipt of the request. While the Custodian certified that she was conducting a good faith search for any existing records, which entailed forwarding the Complainant’s OPRA request to other employees, the immediate access language of N.J.S.A. 47:1A-5(e) suggests that the Custodian was still obligated to notify the Complainant immediately of such, as opposed to the day after the statutorily-mandated seven days of OPRA.

Therefore, 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98. See also Harris, GRC 2011-65.

### **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 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 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 (4<sup>th</sup>) 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. However, the Council has further described the requirements for a proper request for an extension of time:

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<sup>[2]</sup> OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

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 (2<sup>nd</sup>) 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 (6<sup>th</sup>) 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 March 30, 2015 OPRA request as follows:

<b>Date of Request for Extension</b>	<b>New Deadline for Response</b>	<b>Reason for Extension</b>
April 9, 2015	April 23, 2015	So that the OPRA request may “be appropriately processed.”
April 23, 2015	May 7, 2015	So that the OPRA request may “be appropriately processed.”
May 7, 2015	May 21, 2015	So that the OPRA request may “be appropriately processed.”
May 21, 2015	June 4, 2015	So that the OPRA request may “be appropriately processed.”
June 4, 2015	June 11, 2015	So that the OPRA request may “be appropriately processed.”
June 11, 2015	June 25, 2015	So that the OPRA request may “be appropriately processed.”
June 25, 2015	July 9, 2015	So that the OPRA request may “be appropriately processed.”

The subject OPRA request sought any contracts Kean University had with the City of Elizabeth, specifically to provide IT/data processing/telecommunications services to the town, during a two (2) year period. The Custodian extended the response time on seven (7) occasions for a total of over seventy (70) 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.<sup>4</sup>

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 to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to respond effectively to the request.<sup>5</sup>

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. The Custodian’s certification regarding the search indicated that, after forwarding the request to Ms. Vazquez on

<sup>4</sup> 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. See also Rodriguez v. Kean University, GRC Complaint No. 2015-114 (April 2016).

<sup>5</sup> “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*.

the day of receipt, she sent multiple follow-up e-mails to Ms. Vazquez and other individuals associated with Kean. Those e-mails were sent before being advised in a June 10, 2015 meeting that responsive records did exist. Following that meeting, the Custodian certified that she was not in receipt of the responsive contracts until July 8, 2015, as she was advised that the contracts had to be pulled from storage and reviewed.

The Custodian had more than 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 five occasions. Based on the evidence of record, and considering also the requirements of N.J.S.A. 47:1A-5(e), which classifies contracts of the sort Complainant requested as “immediate access” records, the GRC finds that extending the response time 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 March 30, 2015 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). However, the GRC 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 any responsive records to the Complainant 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)).

The Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by failing to respond immediately to the Complainant's OPRA request and unnecessarily extending the response time by over seventy (70) business days. 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. Additionally, the Custodian did disclose existing responsive records. 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'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 immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's March 30, 2015 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). However, the GRC 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 any responsive records to the Complainant on July 9, 2015.
3. The Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by failing to respond immediately to the Complainant's OPRA request and unnecessarily extending the response time by over seventy (70) business days. 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. Additionally, the Custodian did disclose existing responsive records. 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.

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June 21, 2016