



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

January 31, 2017 Government Records Council Meeting

Luis Rodriguez

Complainant
Complaint Nos. 2015-227 and 2015-228

Complainant

v.

Kean University

Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 April 7, 2015 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests, 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) 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).
2. Notwithstanding the Custodian’s “deemed” denial of access, the Council declines to order disclosure in this instance because the Custodian certified that she notified the Complainant on August 17, 2015, that no responsive records exist, and there is no evidence in the records disputing the response.
3. Although the Custodian violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant’s April 7, 2015 OPRA requests for purchase orders and vouchers, the Custodian ultimately responded to the requests on August 17, 2015, stating that no responsive records exist. Additionally, the evidence in the record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 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 Nos. 2015-227 and 2015-228²

v.

**Kean University³
Custodial Agency**

Records Relevant to Complaint:

OPRA Request #1:⁴

“I request any and/or all purchase orders, with accompanying vouchers, that occurred in the fiscal years of 2014 and/or 2015, related to payments made to the Kean Foundation with monies paid to Kean University by Union County (NJ) for providing the county with IT/data processing/telecommunications.”

OPRA Request #2:⁵

“I request any and/or all purchase orders, with accompanying vouchers, that occurred in the fiscal years of 2014 and/or 2015, related to payments made to the Kean Foundation with monies paid to Kean University by the township of Elizabeth (NJ) for providing the town of Elizabeth (NJ) with IT/data processing/telecommunications.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: April 7, 2015

Response Made by Custodian: April 16, 2015; April 30, 2015; May 14, 2015; May 28, 2015; June 11, 2015; June 25, 2015; July 9, 2015; July 28, 2015; August 11, 2015; and August 17, 2015

GRC Complaint Received: July 22, 2015

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Jennifer McGruther, DAG.

⁴ This OPRA request is the subject of GRC Complaint No. 2015-227.

⁵ This OPRA request is the subject of GRC Complaint No. 2015-228.

Background⁶

Request and Response:

On April 7, 2015, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On April 16, 2015, seven (7) business days later, the Custodian responded in writing, seeking an extension of time until April 30, 2015, to respond. The Custodian then sought additional extensions of time on April 30, 2015, May 14, 2015, May 28, 2015, June 11, 2015, June 25, 2015, July 9, 2015, July 28, 2015, and August 11, 2015. On August 17, 2015, the Custodian responded to both OPRA requests, stating that no responsive records exist.

Denial of Access Complaint:

On July 22, 2015, the Complainant filed both Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant asserted that since filing his OPRA requests, the Custodian has sent correspondence extending her time to respond seven (7) times. The Complainant stated that he received the first extension to respond on the seventh (7th) business day after receipt of the OPRA and subsequently received six (6) additional notices to extend thereafter. The Complainant stated he received the most recent notice from the Custodian on July 9, 2015, extending the time to respond to until July 28, 2015.

The Complainant argued in both complaints that he sought purchase orders with accompanying vouchers, which are a type of record required to be produced immediately under OPRA. *See N.J.S.A. 47:1A-5(e)*. The Custodian stated that the Custodian’s failure to respond to the requests after more than three (3) months constituted a violation of OPRA.

Statement of Information:

On August 17, 2015, the Custodian filed a Statement of Information (“SOI”) for both requests. The Custodian certified that she received the Complainant’s OPRA requests on April 7, 2015, and sought an extension of time to respond on April 16, 2015, the seventh (7th) business day after receipt. The Custodian then certified that she sought additional extensions of time to respond on April 30, 2015, May 14, 2015, May 28, 2015, June 11, 2015, June 25, 2015, July 9, 2015, July 28, 2015, and August 11, 2015. The Custodian certified that those OPRA requests coincided with each other, along with two (2) additional OPRA requests seeking the same records, but between the fiscal years of 2006 to 2013. As a result, the Custodian certified that she processed all of the OPRA requests in conjunction with each other to ensure accuracy and coordinated responses.

The Custodian certified that she forwarded the OPRA requests at issue to Kean University’s Office of University Purchasing (“OUP”) on April 7, 2015. The Custodian then sent a follow-up message on April 30, 2015 to OUP regarding the requests at issue. The Custodian

⁶ 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.

certified that she received documents from the Office of Human Resources (“OHR”) on May 1, 2015. Upon review, the Custodian certified that none of the documents were responsive to either OPRA request and confirmed with OUP that no responsive documents existed. After receiving confirmation, the Custodian certified that she forwarded the OPRA requests to the Office of Financial Services (“OFS”) on June 16, 2015, to locate any “accompanying vouchers” in response to both requests. The Custodian certified that OUP, OHR, and OFS worked together during this time to locate any responsive records. The Custodian received final confirmation that no responsive records exist for either request on August 13, 2015, and notified the Complainant via e-mail on August 17, 2015.

The Custodian argued that the repeated extensions of time were necessary to conduct an accurate and thorough search for records for both OPRA requests and two (2) other OPRA requests seeking similar records.⁷ The Custodian certified that she kept the Complainant apprised of his requests’ status throughout the process. The Custodian further stated that because she notified the Complainant within the extended period that no responsive records exist, the complaint is now moot.

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).⁸ 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 dated 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 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).⁹ 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

⁷ Those OPRA requests are not at issue in the instant complaint.

⁸ 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.

⁹ 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).

2007), holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records.

Here, the Complainant sought from both OPRA requests “purchase orders, with accompanying vouchers.” Purchase orders and vouchers are immediate access records under N.J.S.A. 47:1A-5(e). See Rodriguez v. Kean Univ., GRC Complaint No. 2015-331 (February 2016). As such, the Custodian had an obligation to respond to both OPRA requests for the records immediately, granting or denying access, requesting additional time to respond, or requesting clarification. The evidence of record reveals, however, that the Custodian did not initially respond to the Complainant’s request until April 16, 2015, which was the seventh (7th) business day following receipt of the request. Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s April 7, 2015 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests, 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 and Harris, GRC 2011-65. See also Herron, GRC 2006-178.

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.

Here, notwithstanding the Custodian’s “deemed” denial of access, the Council declines to order disclosure in this instance because the Custodian certified that she notified the Complainant on August 17, 2015, that no responsive records exist, and there is no evidence in the records disputing the response.

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, although the Custodian violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's April 7, 2015 OPRA requests for purchase orders and vouchers, the Custodian ultimately responded to the requests on August 17, 2015, stating that no responsive records exist. Additionally, the evidence in the record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 April 7, 2015 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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) 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).
2. Notwithstanding the Custodian's "deemed" denial of access, the Council declines to order disclosure in this instance because the Custodian certified that she notified the Complainant on August 17, 2015, that no responsive records exist, and there is no evidence in the records disputing the response.
3. Although the Custodian violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's April 7, 2015 OPRA requests for purchase orders and vouchers, the Custodian ultimately responded to the requests on August 17, 2015, stating that no responsive records exist. Additionally, the evidence in the record does

not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: Samuel A. Rosado
Staff Attorney

January 24, 2017