



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

October 25, 2016 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-221, 2015-231 and 2015-235

v.

Kean University
Custodian of Record

At the October 25, 2016 public meeting, the Government Records Council (“Council”) considered the October 18, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s November 4, November 28, or December 11, 2014 OPRA requests, 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 Council should decline to order disclosure of any records because the Custodian did so on August 11, 2015.
2. The Custodian’s repeated extensions, numbering between one hundred and fifty (150) and over one hundred and seventy (170) business days, resulted in a violation of OPRA. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian certified in the SOI that she disclosed 603 pages of records to the Complainant on August 11, 2015. While these unreasonable extensions are significant, 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 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 25th Day of October, 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: October 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 25, 2016 Council Meeting**

**Luis Rodriguez¹
Complainant**

**GRC Complaint No. 2015-221,
2015-231, and 2015-235**

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint:

November 4, 2014 OPRA request: Electronic copies via e-mail of “any and/or all” correspondence between Dawood Farahi, Phil Connelly, Audrey Kelly and/or her subordinates in “University Relations,” Jeffery Toney, Geri Benedetto, George Thorn and/or his subordinates in “Purchasing,” Phyllis Duke and/or her subordinates in “Operations,” Faruque Chowdhury, and/or the Custodian regarding issues related to the Shanghai Rongma Office Furniture Company (“Rongma”) between 2011 and the present.³

November 28, 2014 OPRA request: Electronic copies via e-mail of “any and/or all” applications that Kean University (“Kean”) supplied to Rongma for work on the conference table in the new Green Lane Building from 2011 to present.⁴

December 11, 2014 OPRA request: Electronic copies via e-mail of “any and/or all” correspondence between Kean Wenzhou and Kean regarding the furniture purchase agreement between these parties and Rongma from January 1, 2013, to present.⁵

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 4, 2014; December 1, 2014; December 11, 2014

Response Made by Custodian: Various

GRC Complaint Received: July 20, 2015; July 24, 2015; July 27, 2015

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

³ This OPRA request is the subject of GRC Complaint No. 2015-221.

⁴ This OPRA request is the subject of GRC Complaint No. 2015-231.

⁵ This OPRA request is the subject of GRC Complaint No. 2015-235.

Background⁶

Request and Response:

GRC 2015-221

On November 4, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 14, 2014, the Custodian responded in writing, advising that an extension until December 2, 2014, would be necessary to process the request. On December 2, 2014, the Custodian responded in writing, advising that an extension until December 16, 2014, would be necessary. On December 16, 2014, the Custodian responded in writing, seeking an extension until January 9, 2015. On January 9, 2015, the Custodian responded in writing, advising that an extension until January 23, 2015, would be necessary. On January 23, 2015, the Custodian responded in writing, seeking an extension until February 6, 2015. On February 6, 2015, the Custodian responded in writing, advising that an extension until February 20, 2015, would be necessary. On February 20, 2015, the Custodian responded in writing, seeking an extension until March 6, 2015. On March 6, 2015, the Custodian responded in writing, advising that an extension until March 20, 2015, would be necessary. On March 20, 2015, the Custodian responded in writing, seeking an extension until April 2, 2015. On April 2, 2015, the Custodian responded in writing, advising that an extension until April 16, 2015, would be necessary. On April 16, 2015, the Custodian responded in writing, advising that an extension until April 30, 2015, would be necessary. On April 30, 2015, the Custodian responded in writing, advising that an extension until May 14, 2015, would be necessary. On May 14, 2015, the Custodian responded in writing, advising that an extension until May 28, 2015, would be necessary. On May 28, 2015, the Custodian responded in writing, advising that an extension until June 11, 2015, would be necessary. On June 11, 2015, the Custodian responded in writing, advising that an extension until June 25, 2015, would be necessary. On June 25, 2015, the Custodian responded in writing, advising that an extension until July 9, 2015, would be necessary. On July 9, 2015, the Custodian responded in writing, advising that an extension until July 28, 2015, would be necessary.

GRC 2015-231

On November 28, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 10, 2014, the Custodian responded in writing, advising that an extension until December 23, 2014, would be necessary to process the request. On December 22, 2014, the Custodian responded in writing, advising that an extension until January 16, 2015, would be necessary. On January 16, 2015, the Custodian responded in writing, seeking an extension until January 30, 2015. On January 30, 2015, the Custodian responded in writing, advising that an extension until February 13, 2015, would be necessary. On February 13, 2015, the Custodian responded in writing, seeking an extension until February 27, 2015. On February 27, 2015, the Custodian responded in writing, advising that an extension until March 13, 2015, would be necessary. On March 12,

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.

2015, the Custodian responded in writing, seeking an extension until March 27, 2015. On March 27, 2015, the Custodian responded in writing, advising that an extension until April 10, 2015, would be necessary. On April 10, 2015, the Custodian responded in writing, seeking an extension until April 24, 2015. On April 24, 2015, the Custodian responded in writing, advising that an extension until May 8, 2015, would be necessary. On May 8, 2015, the Custodian responded in writing, advising that an extension until May 22, 2015, would be necessary. On May 22, 2015, the Custodian responded in writing, advising that an extension until June 4, 2015, would be necessary. On June 4, 2015, the Custodian responded in writing, advising that an extension until June 18, 2015, would be necessary. On June 18, 2015, the Custodian responded in writing, advising that an extension until July 2, 2015, would be necessary. On July 2, 2015, the Custodian responded in writing, advising that an extension until July 23, 2015, would be necessary. On July 23, 2015, the Custodian responded in writing, advising that an extension until August 6, 2015, would be necessary.

GRC 2015-235

On December 11, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 22, 2014, the Custodian responded in writing, advising that an extension until January 16, 2015, would be necessary to process the request. On January 16, 2015, the Custodian responded in writing, seeking an extension until January 30, 2015. On January 30, 2015, the Custodian responded in writing, advising that an extension until February 13, 2015, would be necessary. On February 13, 2015, the Custodian responded in writing, seeking an extension until February 27, 2015. On February 27, 2015, the Custodian responded in writing, advising that an extension until March 13, 2015, would be necessary. On March 12, 2015, the Custodian responded in writing, seeking an extension until March 27, 2015. On March 27, 2015, the Custodian responded in writing, advising that an extension until April 10, 2015, would be necessary. On April 10, 2015, the Custodian responded in writing, seeking an extension until April 24, 2015. On April 24, 2015, the Custodian responded in writing, advising that an extension until May 8, 2015, would be necessary. On May 8, 2015, the Custodian responded in writing, advising that an extension until May 22, 2015, would be necessary. On May 22, 2015, the Custodian responded in writing, advising that an extension until June 4, 2015, would be necessary. On June 4, 2015, the Custodian responded in writing, advising that an extension until June 18, 2015, would be necessary. On June 18, 2015, the Custodian responded in writing, advising that an extension until July 2, 2015, would be necessary. On July 2, 2015, the Custodian responded in writing, advising that an extension until July 23, 2015, would be necessary. On July 23, 2015, the Custodian responded in writing, advising that an extension until August 6, 2015, would be necessary.

Denial of Access Complaint:

On July 20, 2015, the Complainant filed his first (1st) Denial of Access Complaint with the Government Records Council (“GRC”). On July 24, 2015, the Complainant filed his second (2nd) Denial of Access Complaint with the GRC. On July 27, 2015, the Complainant filed his third (3rd) Denial of Access Complaint with the GRC.

Therein, the Complainant contended that the Custodian continually extended the time frame to respond on all three (3) OPRA requests. The Complainant noted that the Custodian has effectively sought between seven (7) and (9) months of extensions. The Complainant contended that these extensions were unreasonable and resulted in OPRA violations.

Supplemental Response:

GRC 2015-221

On July 28, 2015, the Custodian responded in writing, advising that an extension until August 11, 2015, would be necessary. On August 11, 2015, the Custodian responded in writing, advising that an extension until August 25, 2015, would be necessary. On August 11, 2015, the Custodian responded, providing access to a number of records, some with redactions in accordance with N.J.S.A. 47:1A-1.1.

GRC 2015-231

On August 6, 2015, the Custodian responded in writing, advising that an extension until August 20, 2015, would be necessary. On August 11, 2015, the Custodian responded, providing access to a number of records, some with redactions in accordance with N.J.S.A. 47:1A-1.1.

GRC 2015-235

On August 6, 2015, the Custodian responded in writing, advising that an extension until August 20, 2015, would be necessary. On August 11, 2015, the Custodian responded, providing access to a number of records, some with redactions in accordance with N.J.S.A. 47:1A-1.1.

Statement of Information:

On August 13, 2015, the Custodian filed three (3) Statements of Information (“SOI”).

GRC 2015-221

The Custodian certified that she received the Complainant’s OPRA request on November 4, 2014. The Custodian certified that she forwarded the request to the named individuals and sought an extension of time until November 14, 2014, to allow those individuals to provide adequate responses. The Custodian affirmed that she, as well as two other individuals, did not identify any responsive records. The Custodian certified that one of the individuals located and provided her records for review. The Custodian averred that she sought a second (2nd) extension on December 2, 2014, to review the located records; however, another employee identified additional records on December 9, 2014.

The Custodian certified that over the following weeks, the Complainant submitted two (2) closely related OPRA requests (at issue in GRC 2015-231 and GRC 2015-235); thus, she processed all three requests together. The Custodian affirmed that she sought multiple extensions through March 2015 because individuals were identifying responsive records through this period.

The Custodian certified that she sought additional time from March 2015 through August 2015 because she needed to review over 800 pages of e-mails that were potentially responsive to all three (3) requests. The Custodian needed to determine whether the records were, in fact, responsive and if they required redaction. The Custodian certified that she ultimately disclosed responsive records on August 11, 2015, with redactions for “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material, attorney-client privileged material, computer security information, and personal information. N.J.S.A. 47:1A-1.1.

GRC 2015-231

The Custodian certified that she received the Complainant’s OPRA request on December 1, 2014. The Custodian noted that she simultaneously received two (2) additional requests regarding the same subject on that day. The Custodian certified that she forwarded the request to University Operations and University Purchasing. The Custodian affirmed that the Assistant Vice President for University Operations confirmed that she previously provided the Custodian with potentially responsive records in connection with “the related November 2014” requests (at issue in GRC 2015-221). The Custodian certified that the Assistant Vice President also advised that she would conduct another review to verify her assertion. The Custodian certified that she received additional records from University Operations, as well as records from University Purchasing on December 9, 2015.

The Custodian certified that over the following weeks, the Complainant submitted a third (3rd) closely related OPRA request (at issue in GRC 2015-235); thus, she processed these two requests together along with the OPRA request at issue in GRC 2015-221. As noted above, Custodian certified that she sought multiple extensions through August because of the number of potentially responsive records. The Custodian certified that she ultimately disclosed responsive records on August 11, 2015, with redactions for ACD material, attorney-client privileged material, computer security information, and personal information. N.J.S.A. 47:1A-1.1.

GRC 2015-235

The Custodian certified that she received the Complainant’s OPRA request on December 11, 2014. The Custodian noted that she previously received and was processing two (2) requests regarding the same subject (at issue in GRC 2015-221 and GRC 2015-231). The Custodian certified that she forwarded the request to various Kean officials. The Custodian affirmed that at least six (6) of those individuals located responsive records in or about March 2015. The Custodian confirmed that, after receiving responsive records, she required one last search to ensure all responsive records had been gathered.

The Custodian certified that she processed the two requests together, along with the other two (2) OPRA requests at issue in GRC 2015-221 and 2015-231, over the weeks that followed. As noted above, Custodian certified that she sought multiple extensions through August because of the number of potentially responsive records. The Custodian certified that she ultimately disclosed responsive records on August 11, 2015, with redactions for ACD material, attorney-client privileged material, computer security information and personal information. N.J.S.A. 47:1A-1.1.

The Custodian affirmed that, of the more than 800 pages of records located, she ultimately provided 603 pages to the Complainant on August 11, 2015. The Custodian contended that the matter was rendered moot at the time of her response. Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660 (App. Div. 2008); L.R. v. Camden Bd. of Educ., 2012 N.J. Super. Unpub. LEXIS 1140, 6-7 (App. Div. 2012).

The Custodian argued that she timely responded to all three (3) OPRA requests. The Custodian contended that the Complainant's first (1st) and third (3rd) OPRA requests lacked specificity and that she therefore was not technically required to respond. *See* Mason, 2008 N.J. Super. Unpub. LEXIS 1660 at 12-13; MAG Entm't LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian contended that the Complainant failed to identify all senders/recipients specifically by name. The Custodian argued, however, that she undertook an exhaustive search of all three (3) requests, given their common nature. The Custodian contended that, after receiving a number of possibly responsive records, she was required to review and redact same where applicable. The Custodian asserted that she routinely updated the Complainant in writing throughout the process before ultimately disclosing records on August 11, 2015.

Moreover, the Custodian argued that even if all three (3) OPRA requests were valid in total, extensions are appropriate in certain circumstances. The Custodian asserted that extensions "reflect the Legislature's intention to balance the requestor's interest in prompt access to identifiable records and the operational needs of government." NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian contended that reasonable extension determinations rely on a number of considerations, both statutory and practical. N.J.S.A. 47:1A-5(i). The Custodian contended that she sought extensions from November through August because two (2) of the three (3) requests were invalid and they all identified the same subject. The Custodian asserted that she and various Kean employees addressed all three (3) OPRA requests simultaneously to minimize a substantial disruption of agency operations.

Finally, the Custodian asserted that she properly requested extensions of time and provided all responsive records promptly after completing her review. The Custodian contended that, based on the foregoing, she did not unlawfully deny access to any of the subject OPRA requests.

Additional Submissions:

On September 24, 2015, the Complainant submitted a rebuttal to the Custodian's SOI submitted in GRC 2015-221. Therein, the Complainant disagreed with the Custodian's contention that the Complaint is moot. The Complainant stated that he filed his complaint to contest the length of time it took the Custodian to respond to his November 4, 2014 OPRA request. The Complainant asserted that ultimately providing responsive records does not negate issues of timeliness. *See* Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint No. 2014-394 (July 2015). To this end, the Complainant contended that the Custodian violated OPRA because she failed to provide an explanation for the extensions. Further, the Complainant

argued that the Custodian failed to provide a date certain on which she anticipated disclosing the responsive records.

Additionally, the Complainant contended that his OPRA request was valid, arguing that his request named supervisors “and/or . . . subordinates.” The Complainant argued that the Custodian could have easily identified “subordinates” by contacting the named individuals and requiring them to reach out to their respective staffs. The Complainant further noted that the Custodian was able to locate and provide responsive records, and could not now argue that the request was invalid. *See* Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). The Complainant also noted that his OPRA request conformed to the GRC’s “Citizen’s Guide to OPRA” (Second Edition – July 2011). The Complainant contended that the Custodian’s assertion belied her ability to search for responsive records, as opposed to conducting research. *See* Moore v. Twp. of Nutley (Essex), GRC Complaint No. 2010-110 (June 2011)(*quoting* MAG, 375 N.J. Super. at 546); 500 W57 JV LLC v. Twp. of Lakewood, 2015 N.J. Super. Unpub. LEXIS 1389; (June 9, 2015)(*citing* Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 515 (App. Div. 2010)).

On January 28, 2016, the Complainant submitted a rebuttal to the Custodian’s SOI submitted in GRC 2015-231. Therein, the Custodian reiterated that the complaint was not moot, again raising the timeliness issue. The Complainant also contended that the Custodian failed to submit enough detail regarding her search for him to argue effectively against the extensions.⁷

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to an 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 (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not agree to the custodian’s request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep’t of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the

⁷ The Complainant cited to Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191 (October 28, 2002) in support of his argument that the Custodian failed to describe her search adequately. However, the issue in Courier Post was the reasonableness of a special service charge and the loosening of the “immediate access” provision. Neither issue is before the Council in this complaint. Further, the Complainant made additional arguments not relevant to the timeliness question.

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

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

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

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

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

In the instant matter, the Custodian sought multiple extensions for the Complainant’s three (3) OPRA request as follows:

Date of Request for Extension (GRC 2015-221)	New Deadline for Response	Reason for Extension
November 14, 2014	December 2, 2014	So that the OPRA request may “be appropriately processed.”
December 2, 2014	December 16, 2014	So that the OPRA request may “be appropriately processed.”
December 16, 2014	January 9, 2015	So that the OPRA request may “be appropriately processed” and as a result of Kean’s closure due to holiday break.
January 9, 2015	January 23, 2015	So that the OPRA request may “be appropriately processed.”
January 23, 2015	February 6, 2015	So that the OPRA request may “be appropriately processed.”
February 6, 2015	February 20, 2015	So that the OPRA request may “be appropriately processed.”
February 20, 2015	March 6, 2015	So that the OPRA request may “be appropriately processed.”
March 6, 2015	March 20, 2015	So that the OPRA request may “be appropriately processed.”
March 20, 2015	April 2, 2015	So that the OPRA request may “be appropriately processed.”
April 2, 2015	April 16, 2015	So that the OPRA request may “be appropriately processed.”
April 16, 2015	April 30, 2015	So that the OPRA request may “be appropriately processed.”
April 30, 2015	May 14, 2015	So that the OPRA request may “be appropriately processed.”
May 14, 2015	May 28, 2015	So that the OPRA request may “be appropriately processed.”
May 28, 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.”
July 9, 2015	July 28, 2015	So that the OPRA request may “be appropriately processed.”
July 28, 2015	August 11, 2015	So that the OPRA request may “be appropriately processed.”

Date of Request for Extension (GRC 2015-231)	New Deadline for Response	Reason for Extension
December 10, 2014	December 23, 2014	So that the OPRA request may “be appropriately processed.”
December 22, 2014	January 16, 2015	So that the OPRA request may “be appropriately processed” and as a result of Kean’s closure due to holiday break.
January 16, 2015	January 30, 2015	So that the OPRA request may “be appropriately processed.”
January 30, 2015	February 13, 2015	So that the OPRA request may “be appropriately processed.”
February 13, 2015	February 27, 2015	So that the OPRA request may “be appropriately processed.”
February 27, 2015	March 13, 2015	So that the OPRA request may “be appropriately processed.”
March 12, 2015	March 27, 2015	So that the OPRA request may “be appropriately processed.”
March 27, 2015	April 10, 2015	So that the OPRA request may “be appropriately processed.”
April 10, 2015	April 24, 2015	So that the OPRA request may “be appropriately processed.”
April 24, 2015	May 8, 2015	So that the OPRA request may “be appropriately processed.”
May 8, 2015	May 22, 2015	So that the OPRA request may “be appropriately processed.”
May 22, 2015	June 4, 2015	So that the OPRA request may “be appropriately processed.”
June 4, 2015	June 18, 2015	So that the OPRA request may “be appropriately processed.”
June 18, 2015	July 2, 2015	So that the OPRA request may “be appropriately processed.”
July 2, 2015	July 23, 2015	So that the OPRA request may “be appropriately processed.”
July 23, 2015	August 6, 2015	So that the OPRA request may “be appropriately processed.”
August 6, 2015	August 20, 2015	So that the OPRA request may “be appropriately processed.”

Date of Request for Extension (GRC 2015-235)	New Deadline for Response	Reason for Extension
December 22, 2014	January 16, 2015	So that the OPRA request may “be appropriately processed” and as a result of Kean’s closure due to holiday break.
January 16, 2015	January 30, 2015	So that the OPRA request may “be appropriately processed.”
January 30, 2015	February 13, 2015	So that the OPRA request may “be appropriately processed.”
February 13, 2015	February 27, 2015	So that the OPRA request may “be appropriately processed.”
February 27, 2015	March 13, 2015	So that the OPRA request may “be appropriately processed.”
March 12, 2015	March 27, 2015	So that the OPRA request may “be appropriately processed.”
March 27, 2015	April 10, 2015	So that the OPRA request may “be appropriately processed.”
April 10, 2015	April 24, 2015	So that the OPRA request may “be appropriately processed.”
April 24, 2015	May 8, 2015	So that the OPRA request may “be appropriately processed.”
May 8, 2015	May 22, 2015	So that the OPRA request may “be appropriately processed.”
May 22, 2015	June 4, 2015	So that the OPRA request may “be appropriately processed.”
June 4, 2015	June 18, 2015	So that the OPRA request may “be appropriately processed.”
June 18, 2015	July 2, 2015	So that the OPRA request may “be appropriately processed.”
July 2, 2015	July 23, 2015	So that the OPRA request may “be appropriately processed.”
July 23, 2015	August 6, 2015	So that the OPRA request may “be appropriately processed.”
August 6, 2015	August 20, 2015	So that the OPRA request may “be appropriately processed.”

The November 4, 2014 OPRA request sought correspondence to/from a number of individuals over approximately a five (5) year period regarding Rongma. The November 28, 2014 OPRA request sought applications that Kean sent to Rongma over a five (5) year period. The December 11, 2014 OPRA request also sought correspondence to/from Kean and Kean

Wenzhou over an approximately three (3) year period regarding Rongma and furniture purchases. For each request, the Custodian extended the response time on eighteen (18), seventeen (17), and sixteen (16) occasions, respectively. Those extensions amounted to over one hundred and seventy (170), one hundred and fifty-five (155), and one hundred and fifty (150) business days (loosely accounting for holidays and breaks). 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.⁸

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.⁹

The evidence of record indicates that, based on the nature of the OPRA request, the Custodian was working with multiple individuals to respond to all three (3) OPRA requests. However, the Custodian certified in the SOI that she did not receive over 800 pages from these individuals until March 2015: three (3) to four (4) months after the submission of the subject OPRA requests. Further, although the Custodian provided details as to the search undertaken to locate responsive records, no other individuals supplemented the record to justify the long delay. It should be noted that the Custodian certified in the SOI that she reviewed all three (3) OPRA requests at the same time for expediency purposes because they focused on the same topic: Rongma's relationship with Kean. The Custodian ultimately disclosed 603 pages of records, some with redactions, to the Complainant on August 11, 2015.¹⁰

From the Custodian's receipt of all three (3) OPRA requests, she sought eleven (11), nine (9), and eleven (11) business days respectively. The Custodian then sought an additional ten (10), eleven (11), and ten (10) business days, respectively. Thus, the Custodian sought, in addition to the original seven (7) business days, nearly a full month of business days for each OPRA request. However, the Custodian continued to extend the time frame an additional one hundred and thirty (130) or more business days thereafter. The Custodian mostly provided vague reasons for the extensions. Thus, the record does not sufficiently prove any particularly harmful extenuating circumstances beyond the requests relating to the same topic that would have warranted such an extensive delay.

⁸ In Ciccarone, GRC 2013-280, 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.

⁹ "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*.

¹⁰ The GRC notes that the Complainant did not take issue with the denial; rather, the Complainant disputed the Custodian's multiple extensions over a six (6) month period.

Based on the evidence of record, the GRC finds that extending the response time for the OPRA requests to the extent demonstrated in the instant matter was clearly excessive and flies in the face of OPRA's mandate to "promptly comply" with a records request and to grant or deny access "as soon as possible . . ." N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). In the instant matter, the GRC finds it unreasonable for Kean to take more than three (3) months to locate a stack of records comparable to a ream and a half of copy paper, let alone another four (4) to five (5) months to review them and make redactions where applicable. Acknowledging that the requests related to a similar topic, the GRC is not persuaded that Kean needed over one hundred and fifty (150) business days to produce a comparably small number of records.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the Complainant's November 4, November 28, or December 11, 2014 OPRA requests, 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 Council should decline to order disclosure of any records because the Custodian did so on August 11, 2015.

Finally, the GRC notes that it will not address the Custodian's argument that the requests were invalid or the Complainant's counter-arguments because the Custodian was able to identify and disclose records. *See Gannett v. Cnty. of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005); *Burke v. Brandes*, 429 N.J. Super. 169 (App. Div. 2012).

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)).

Here, the Custodian's repeated extensions, numbering between one hundred and fifty (150) and over one hundred and seventy (170) business days, resulted in a violation of OPRA. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian certified in the SOI that she disclosed 603 pages of records to the Complainant on August 11, 2015. While these unreasonable extensions are significant, 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 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 November 4, November 28, or December 11, 2014 OPRA requests, 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 Council should decline to order disclosure of any records because the Custodian did so on August 11, 2015.
2. The Custodian's repeated extensions, numbering between one hundred and fifty (150) and over one hundred and seventy (170) business days, resulted in a violation of OPRA. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian certified in the SOI that she disclosed 603 pages of records to the Complainant on August 11, 2015. While these unreasonable extensions are significant, 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 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.

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October 18, 2016