



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

September 26, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-234

v.

Kean University
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 27, 2014 OPRA request, based upon the unreasonable imposition of numerous extensions of time to respond. N.J.S.A. 47:1A-6. Ciccarone v. NJ Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days or a reasonable 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 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 all responsive records on August 18, 2015.
2. 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 unreasonably extending the response time by approximately ten (10) months and over 200 business days. The Custodian’s repeated usage of vague and unspecific language with virtually every extension letter and lack of an explanation on failing to obtain timely responses from relevant individuals demonstrated an element of negligence in her duties. However, the Custodian ultimately produced the responsive records on August 18, 2015. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s actions appear to be negligent and heedless since she is vested with the legal responsibility of timely granting and denying access in accordance with the law.



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 26th Day of September, 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: September 29, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-234

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “I request any and all correspondence (for example emails, memoranda, and/or phone texts) that occurred between 2010 and the present between any member of the Kean community (this would include a member of its Board of Trustees and all of its employees) and International Medicare Limited, the International Medical College and Hospital Dhaka, Bangladesh, and/or the International Nursing College, also in Dhaka, on any and all issues related to Kean establishing a relationship with the Medical College and/or the International Nursing College.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: October 27, 2014; November 1, 2014 (1st Clarification); November 4, 2014 (Final Clarification)

Response Made by Custodian: November 5, 2014; November 20, 2014; December 4, 2014; December 18, 2014; January 13, 2015; January 28, 2015; February 12, 2015; February 26, 2015; March 12, 2015; March 26, 2015; April 9, 2015; April 23, 2015; May 7, 2015; May 21, 2015; June 4, 2015; June 18, 2015; July 2, 2015; July 23, 2015; August 6, 2015; August 18, 2015

GRC Complaint Received: July 27, 2015

Background³

Request and Response:

On October 27, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 1, 2014, the Complainant clarified the OPRA request to specify the following individuals:

From Kean University:

1. Members of the Kean [Board of Trustees]

¹ No legal representation listed on record.

² Represented by Jennifer McGruther, DAG.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

2. President Farahi
3. Phil Connelly
4. Jeffrey Toney
5. Any and/or all deans
6. Any and/or all chairs of the [International Nursing College]
7. Faruque Chowdhury

From International Medicare Limited, the International Medical College and/or the International Nursing College:

1. Members of the [Board of Trustees] or similar governing board
2. President or CEO
3. Chief business officer
4. Chief academic officer
5. Any and/or all academic deans
6. Any and/or all chairs of the nursing department

On November 4, 2014, the Complainant added two (2) additional Kean employees for his OPRA request: Michael Searson and Janis Jensen. On November 5, 2014, the Custodian responded in writing, seeking an extension of time to respond to the Complainant's request to until November 20, 2014. The Custodian then sought additional extensions of time on November 20, 2014, December 4, 2014, December 18, 2014, January 13, 2015, January 28, 2015, February 12, 2015, February 26, 2015, March 12, 2015, March 26, 2015, April 9, 2015, April 23, 2015, May 7, 2015, May 21, 2015, June 4, 2015, June 18, 2015, July 2, 2015, July 23, 2015, and August 6, 2015. On August 18, 2016, two (2) days prior to the deadline, the Custodian provided ninety-nine (99) pages of responsive records, with redactions made pursuant to N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On July 27, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that since filing his initial request, the Custodian extended her time to respond eighteen (18) times. The Complainant stated that he received the first extension to respond one (1) business day after his November 4, 2014 clarification and subsequently received eighteen (18) additional notices to extend thereafter.

The Complainant argued that by not responding to his OPRA request for approximately nine (9) months, the Custodian is violating OPRA's requirement that responses to requests must be within a reasonable time.

Statement of Information:

On August 18, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 27, 2014. The Custodian then certified that she received clarifications from the Complainant on November 1, 2014, and November 4, 2014, specifying senders and recipients of the requested correspondence. On November 5, 2014, the Custodian sought an extension of time to respond to the Complainant's OPRA request. The Custodian then certified that she extended the time to respond

on November 20, 2014, December 4, 2014, December 18, 2014, January 13, 2015, January 28, 2015, February 12, 2015, February 26, 2015, March 12, 2015, March 26, 2015, April 9, 2015, April 23, 2015, May 7, 2015, May 21, 2015, June 4, 2015, June 18, 2015, July 2, 2015, July 23, 2015, and August 6, 2015.

Regarding the request at issue, the Custodian certified that she forwarded the OPRA request at issue to each of the named individuals on November 21, 2014. The Custodian then certified that she received responses from those individuals on various dates, spanning from November 2014 through May 2015. The Custodian certified that some responses stated that no responsive records exist, while other replies provided relevant documents that could be responsive to the request at issue or to four (4) other simultaneously open OPRA requests seeking records involving the same or similar parties or subject matter.

The Custodian next certified that she extended the time to respond from May 2015 to August 2015 to review for relevancy to this particular request, legal review for potential redactions, and scanning as necessary. The Custodian certified that she provided the records to the Complainant on August 18, 2015.

The Custodian argued that the repeated extensions were justified on the basis that the Complainant's request was overly broad and lacked specificity. According to the Custodian, the Complainant's usage of "any/all" as part of his OPRA request, seeking correspondence from seven (7) named and unnamed parties of Kean University and six (6) named and unnamed parties of an overseas organization, and identifying a five (5) year time span, created a sizable pool of correspondence to locate and review. The Custodian claimed that the breadth of the request explains why responsive documents came in piecemeal from the named individuals over a span of several months. Therefore, the Custodian contended that the extensions were necessary to conduct a complete search for responsive records and a review for possible redactions.

Analysis

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 provide 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 consent 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 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. *See also Rivera*, GRC 2009-317; *Criscione*, GRC 2010-68; and *Starkey*, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep't of Treas., 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 October 27, 2014 OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
November 4, 2014	November 20, 2014	So that the OPRA request may “be appropriately processed.”
November 20, 2014	December 4, 2014	So that the OPRA request may “be appropriately processed.”
December 4, 2014	December 18, 2014	No specific explanation given.
December 18, 2014	January 13, 2015	So that the OPRA request may “be appropriately processed” and due to the University’s pending closure for holiday break.
January 13, 2015	January 28, 2015	So that the OPRA request may “be appropriately processed.”
January 28, 2015	February 12, 2015	So that the OPRA request may “be appropriately processed.”
February 12, 2015	February 26, 2015	So that the OPRA request may “be appropriately processed.”
February 26, 2015	March 12, 2015	So that the OPRA request may “be appropriately processed.”
March 12, 2015	March 26, 2015	So that the OPRA request may “be appropriately processed.”
March 26, 2015	April 9, 2015	So that the OPRA request may “be appropriately processed.”
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 25, 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 subject OPRA request sought communications by and between Kean University employees and a medical college in Bangladesh over a four (4) year period. The Custodian extended the response time on nineteen (19) occasions for approximately 200 business days, accounting for public holidays. As noted above, a requestor's approval is not required for a valid extension. However, 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. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁴ Id.

In the instant matter, the Custodian issued her first extension on November 4, 2014, upon receiving the second clarification. However, the Custodian did not forward the request to relevant parties until November 21, 2014. The Custodian stated that responses from those individuals arrived sporadically between December 2014 and May 2015, necessitating extension letters during that time. Upon receipt of all pertinent responses, the Custodian argued she needed additional extensions from May 2015 through August 2015 to review for responsiveness, potential redactions, and creating the necessary copies.

Although the Custodian does not require permission to extend the time to respond to an OPRA request, the burden remains with the Custodian to justify the need for such extension(s). That burden increases when the extension of time is measured in months rather than days. The Custodian's SOI and certification failed to meet that burden. There is nothing in the record suggesting that the Custodian proactively took steps to obtain responses from the relevant individuals in a timely manner. Furthermore, all but one of the nineteen (19) extension letters sent to the Complainant lacked specificity as to why it was warranted, demonstrating a lackadaisical attitude at best towards fulfilling the request. Thus, the GRC does not find reasonable to seek approximately seven (7) months of extensions to obtain responses from the individuals identified in the request, and an additional three (3) months for review without additional information. The excessive and unsubstantiated delay represents an element of negligence and heedless disregard of OPRA's intent to ensure a timely production of public records upon request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's October 27, 2014 OPRA request. N.J.S.A. 47:1A-6. Ciccarone, GRC 2013-280. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days or a reasonable 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 declines to order disclosure in this instance because

⁴ "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 evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on August 18, 2015.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant matter, the Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by unreasonably extending the response time by approximately ten (10) months and over 200 business days. The Custodian’s repeated usage of vague and unspecific language with virtually every extension letter and lack of an explanation on failing to obtain timely responses from relevant individuals demonstrated an element of negligence in her duties. However, the Custodian ultimately produced the responsive records on August 18, 2015. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s actions appear to be negligent and heedless since she is vested with the legal responsibility of timely granting and denying access in accordance with the law.

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 October 27, 2014 OPRA request, based upon the unreasonable imposition of numerous extensions of time to respond. N.J.S.A. 47:1A-6. Ciccarone v. NJ Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days or a reasonable 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 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 all responsive records on August 18, 2015.

2. 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 unreasonably extending the response time by approximately ten (10) months and over 200 business days. The Custodian's repeated usage of vague and unspecific language with virtually every extension letter and lack of an explanation on failing to obtain timely responses from relevant individuals demonstrated an element of negligence in her duties. However, the Custodian ultimately produced the responsive records on August 18, 2015. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of timely granting and denying access in accordance with the law.

Prepared By: Samuel A. Rosado
Staff Attorney

September 19, 2017