



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 No. 2015-298

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 OPRA request. N.J.S.A. 47:1A-6. 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 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. Pub. Sch., 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). However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 23, 2015.
2. The Custodian failed to respond immediately to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 23, 2015. Further, 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 31st Day of January, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-298

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of activity statements for Kean University (“Kean”) credit cards held by Dawood Farahi, Jeffrey Toney, Carla Willis, and Alyce Franklin-Owens from April 2014 to the most recently available statement.

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: September 8, 2015
Response Made by Custodian: September 17, 2015
GRC Complaint Received: September 21, 2015

Background³

Request and Response:

On September 7, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 17, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until October 1, 2015, would be necessary to process the OPRA request appropriately.

Denial of Access Complaint:

On September 21, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian untimely responded to his OPRA request because the responsive records were bills classified as “immediate access” records. N.J.S.A. 47:1A-5(e). The Complainant further argued that the extension of time appeared to be unreasonable, noting that he sought recent records. The Complainant argued that the Custodian failed to identify a legitimate reason for the extension.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

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.

Additionally, the Complainant contended that the Custodian failed to attempt to reach a reasonable accommodation.

Additional Submissions:

On October 1, 2015, the Custodian responded in writing, advising that an extension until October 15, 2015 would be necessary to process the OPRA request appropriately. On October 15, 2015, the Custodian responded in writing, advising that an extension until October 29, 2015 would be necessary to process the OPRA request appropriately. On October 23, 2015, the Custodian responded in writing, granting access to 74 pages of responsive records. The Custodian noted that no activity statements existed for Ms. Willis. The Custodian also stated that the bills were redacted to remove personally identifying information exempt under OPRA. N.J.S.A. 47:1A-1.1.

Statement of Information:

On October 23, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 8, 2015. The Custodian certified that she forwarded the request to all names individuals and that Ms. Willis had advised that she did not have a Kean credit card. The Custodian affirmed that the other individuals stated that they would locate and forward records to her as soon as possible. The Custodian certified that she responded to the Complainant in writing on September 17, and October 1, 2015, seeking extensions to allow for collection of the responsive records. The Custodian certified that, once she received the records, she sought a third (3rd) extension in order to redact them. The Custodian certified that she ultimately provided 74 pages of responsive records (with redactions) to the Complainant on October 23, 2015.

The Custodian argued that she timely responded to the Complainant’s OPRA request. The Custodian stated that, notwithstanding OPRA’s “immediate access” policy for “bills,” the courts have found circumstances justifying a delay in a custodian’s response to such. Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191 (App. Div. 2002). The Custodian asserted that in Courier Post, the Appellate Division evaluated the defendants’ ability to comply with an OPRA request for “immediate access” records dependent on, among other factors, the amount of time to “monitor the inspection or examination . . .” Id. at 199. The Custodian contended that here, she was obligated under OPRA to redact “credit cards number[s]” from the responsive records because the information is expressly exempt under OPRA. N.J.S.A. 47:1A-5(a). The Custodian therefore contended that the redaction process required a reasonable extension of time.

Additional Submissions:

On November 26, 2015, the Complainant argued that the Custodian, as in other complaints, disclosed records almost simultaneously with production of the SOI. The Complainant asserted that the Custodian’s common practice of withholding “long overdue” records until submission of an SOI is evidence of her knowing and willful actions.

The Complainant also noted that the responsive bills contained between 80 and 90 redactions for account numbers.⁴ The Complainant disagreed with Kean’s argument that the redactions required so much time, asserting that it should have taken the Custodian less than half a working day to complete.

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).⁵ 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 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).⁶ *See* Cody v. Middletown Twp. Pub. Sch., 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 Complainant requested “activity statements,” for Kean-issued credit cards. Such statements are easily identifiable as “bills,” which categorically are considered records subject to “immediate access.” N.J.S.A. 47:1A-5(e). Although the Custodian argued in the SOI that the Complainant’s OPRA request fell outside of the “ordinary” standard, she still had an obligation to respond to the request 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 seeking an extension to respond until September 17, 2015, which was the seventh (7th) business day following receipt of the request. Although within the normal statutory time frame, the Custodian had “an obligation to immediately” respond to a Complainant granting access, denying access,

⁴ The Complainant did not take issue with the redactions.

⁵ 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.

⁶ 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).

seeking clarification, or requesting an extension time (which she ultimately did). *See also* Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012). Additionally, the GRC is not satisfied that collection of the records and redactions amount to an extenuating circumstance that would have prevented the Custodian from responding immediately to seek an extension.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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 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. However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 23, 2015.

Finally, the GRC notes that it does not reach the issue of the extension because the Complainant's OPRA request was already "deemed" denied at the time when the Custodian sought her first extension.

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 failed to respond immediately to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 23, 2015. Further, 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 OPRA request. N.J.S.A. 47:1A-6. 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 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. Pub. Sch., 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). However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 23, 2015.

2. The Custodian failed to respond immediately to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 23, 2015. Further, 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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 24, 2017