



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

March 28, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2015-324

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 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 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 November 12, 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 November 12, 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 28th Day of March, 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: March 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-324

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of the bills or vouchers for air travel associated with a trip former Governor James McGreevey and a delegation took to China on or around August 26, 2015.

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: September 21, 2015
Response Made by Custodian: October 7, 2015
GRC Complaint Received: October 20, 2015

Background³

Request and Response:

On September 21, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 7, 2015, the Custodian sent the Complainant a letter, dated September 30, 2015, advising the Complainant that an extension of time until October 14, 2015, would be necessary to process the OPRA request appropriately. On October 14, 2015, the Custodian responded in writing, advising that an extension until October 28, 2015 would be necessary to process the OPRA request appropriately.

Denial of Access Complaint:

On October 20, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by continuously extending the time frame to respond to his OPRA request. The Complainant also argued that the Custodian violated N.J.S.A. 47:1A-5(e) because the responsive records are likely either bills or vouchers, which are defined as “immediate access” records.

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.

The Complainant argued that the Custodian failed to identify a legitimate reason for the extensions. Additionally, the Complainant asserted that the Custodian failed to provide a definitive date on which she would disclose the responsive records. The Complainant also contended that the Custodian failed to attempt to reach a reasonable accommodation.

Additional Submissions:

On October 28, 2015, the Custodian responded in writing, advising that an extension until November 12, 2015, would be necessary to process the OPRA request appropriately. On November 12, 2015, the Custodian responded in writing, providing access to a one (1) page record.

Statement of Information:

On November 12, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 21, 2015. The Custodian affirmed that the subject OPRA request was one of three (3) requests received on the same day. The Custodian certified that her search included forwarding the request to Felice Vazquez, Acting Associate Vice President for Strategic Initiatives and Special Counsel.

The Custodian certified that, in responding to the multiple OPRA requests on September 30, 2015, she accidentally failed to include her first extension request, dated September 30, 2015. The Custodian certified that she corrected the issue by forwarding the letter to the Complainant on October 7, 2015. The Custodian affirmed that, after she sought another extensions of time on October 14, 2015, Joann Pobuta, Managing Administrative Assistant in the Office of the Executive Vice President, located possibly responsive records. The Custodian certified that Ms. Vazquez also followed up by seeking additional meetings regarding the subject OPRA request. The Custodian certified that she sought a third and final extension on October 28, 2015, in order to review the records for responsiveness and redactions because they were not officially considered bills or vouchers. The Custodian certified that she held three (3) meetings to discuss legal issues and privacy concerns, at which time the responsive record was identified. She received confirmation that same day that the record could be disclosed without redactions. The Custodian certified that she responded to the Complainant on November 12, 2015, disclosing the one (1) page record.

The Custodian argued that the instant complaint is moot because she provided the Complainant the record responsive to the subject OPRA request. Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, 7 (App. Div. 2008)(affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request).⁴ See also L.R. v. Camden Bd. of Educ., 2012 N.J. Super. Unpub. LEXIS 1140, 6-7 (App. Div. 2012).

Additional Submissions:

On November 16, 2015, the Complainant submitted a rebuttal to the SOI. Therein, the

⁴ In Mason, the complaint contemplated whether the plaintiff’s action was moot based on the invalid nature of the subject OPRA request. Such an issue is not currently before the Council.

Complainant first argued that Mason, 2008 N.J. Super. Unpub. LEXIS 1660, did not support the Custodian's argument that the instant complaint is moot. The Complainant argued that the timeliness violations are still relevant. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191 (App. Div. 2002). The Complainant contended that in Courier Post, the Appellate Division weighed the following several factors in determining whether the records at issue were "ordinarily" subject to immediate access under OPRA:

(1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve, and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place.

Id. at 199.⁵

The Complainant contended that when applied to this complaint, the Courier Post factors do not support the Custodian's contention that she timely responded, because only one invoice totaling one (1) page, originating on June 15, 2015, was responsive to the request. Further, the Complainant noted that the invoice was not in storage, nor were redactions at issue.

Further, the Complainant argued that the Custodian allegedly went "to great length[s]" to argue that the responsive invoice was unidentifiable as an invoice. The Complainant asserted that the Custodian also alleged in the SOI that this invoice required extensive review, which necessitated the final two (2) week extension. The Complainant argued that the evidence of record contradicts the allegation because the record clearly was an invoice not needing redaction.

Finally, the Complainant noted that he argued in his response to the SOI, submitted in Rodriguez v. Kean Univ., GRC Complaint No. 2015-312,⁶ that the Custodian's actions here appear to be knowing and willful in nature. The Complainant argued that disclosure of the invoice in a timely manner could have raised embarrassing questions as to whether Kean was getting reimbursed for the trips in question. The Complainant asserted that this complaint merits that the GRC either: 1) determine that the Custodian and/or Ms. Vazquez knowingly and willfully violated OPRA; or 2) refer this complaint to the Office of Administrative Law for a hearing to determine the knowing and willful issue.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access

⁵ The GRC notes that the listed factors are only relevant in cases where either the Courts or the GRC are determining the reasonableness of a special service charge. See Verry v. Franklin Fire Dist. No. (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014).

⁶ This complaint is currently awaiting adjudication.

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).⁷ 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).⁸ 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 a "bill and/or voucher," for air travel associated with former Governor McGreevey's trip to China on or around August 26, 2015. Such records are clearly 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 October 7, 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, 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).

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

⁷ 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.

⁸ 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).

2006-178. However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on November 12, 2015.

Finally, the GRC notes that it does not reach the issue of the extension's reasonableness because the Complainant's OPRA request was already "deemed" denied at the time that 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 November 12, 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 November 12, 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 November 12, 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

March 21, 2017