



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

v.

Kean University
Custodian of Record

Complaint No. 2015-330

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 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. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Although the Custodian denied the Complainant access to the requested records, the Council declines to order disclosure of said records because the Custodian certified that on December 11, 2015, she disclosed to the Complainant eleven (11) pages of redacted records that were responsive to the Complainant’s request, and there is nothing in the evidence of record disputing sufficiency of the disclosure.
3. Although the Custodian failed to respond to the Complainant’s request for immediate access records immediately, which resulted in in a “deemed” denial of said request, the Custodian did on December 11, 2015, disclose to the Complainant eleven (11) pages of records in redacted form that were responsive to the request, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 31st Day of January, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-330

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Any/all records of purchase orders (i.e., vouchers) and accompanying invoices made by Kean for payments to Kean University and/or its Foundation by Wenzhou Kean and/or the Kean Foundation and/or any other entity associated with Kean University, its Foundation, and/or Wenzhou Kean for airfare and/or hotel expenses, related to a March 2012 trip where Kean spent \$76,500 in airfare and hotels to send 16 Kean officials, family, and students to China for the Wenzhou campus groundbreaking ceremony.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: August 3, 2015

Response Made by Custodian: August 13, 2015; August 27, 2015; September 10, 2015; September 24, 2015; October 8, 2015; October 22, 2015; November 5, 2015; November 19, 2015; December 2, 2015; December 11, 2015

GRC Complaint Received: October 26, 2015

Background³

Request and Response:

On August 1, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 13, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until August 27, 2015⁴ would be necessary to process the OPRA request appropriately. After the initial response, the Custodian requested nine (9) additional extensions of time, totaling over four (4) months in the aggregate.

On December 11, 2015, the Custodian responded to the Complainant’s request, attaching eleven (11) pages of responsive documents with redactions made pursuant to N.J.S.A. 47:1A-1.1(6).

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.

⁴ The Custodian’s original letter contained a typo stating “April 27, 2015.”

Denial of Access Complaint:

On October 26, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, as of the date of his Denial of Access Complaint, the Custodian had replied, seeing extensions of two weeks, on repeated occasions. He noted that the last such response occurred on October 22, 2015, extending the response date to November 5, 2015.

The Complainant asserted that the Custodian had violated OPRA because the responsive records were bills or vouchers, classifying them as “immediate access” records. N.J.S.A. 47:1A-5(e). The Complainant further argued that the Custodian failed to identify any mitigating circumstances for the extension. Additionally, the Complainant contended that the Custodian failed to attempt to reach a reasonable accommodation.

Statement of Information:

On December 11, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 3, 2015. The Custodian certified that she responded in writing on August 13, 2015, informing the Complainant that she needed an extension of time. The Custodian certifies that, after the initial extension of time, she notified the Complainant as follows:

- On August 27, 2015, an additional extension of time was needed until September 10, 2015.
- On September 10, 2015, an additional extension of time was needed until September 24, 2015.
- On September 24, 2015, an additional extension of time was needed until October 8, 2015.
- On October 8, 2015, an additional extension of time was needed until October 22, 2015.
- On October 22, 2015, an additional extension of time was needed until November 5, 2015.
- On November 5, 2015, an additional extension of time was needed until November 19, 2015.
- On November 19, 2015, an additional extension of time was needed until December 2, 2015.
- On December 2, 2015, an additional extension of time was needed until December 16, 2015.

The Custodian certified that repeated extensions of time were required because she needed to obtain the records through Acting Associate Vice President for Strategic Initiatives and Special Counsel, Felice Vasquez. The Custodian averred that she sent several follow-up e-mails to Ms. Vasquez throughout the extension period but did not receive responsive records until December 8, 2015. The Custodian certified that thereafter the records were forwarded to the Office of Human Resources for review and redaction. The Custodian certified that she e-mailed the Complainant eleven (11) pages of redacted records responsive to the request on December

11, 2015.⁵ The Custodian argued that because the records were disclosed to the Complainant in a timely manner, the complaint was moot.⁶

Additional Submissions:

On January 18, 2016, the Complainant argued that OPRA permits the GRC to fine employees other than the Custodian, who have knowingly and willfully violated OPRA. The Complainant requested that the GRC make this finding in regards to Ms. Vasquez. He noted the instances in the SOI where the Custodian certified that she sent follow-up e-mails to Ms. Vasquez regarding the search for responsive records. He further argued that on August 22, 2015, a few weeks after his request was submitted, a Kean spokesperson was quoted in a Star-Ledger article on travel to China. He argued that the University “had to have assembled and inspected the invoices associated with the travel which is the subject of this complaint” in order for a spokesperson to speak to the Star-Ledger.

On January 19, 2016, the Complainant argued that Ms. Vasquez “took her sweet time in providing the requested documents to Kean’s custodian” and had therefore violated OPRA and “should be punished accordingly.” He asserted that the GRC should refer his complaint to an administrative law judge.⁷

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond accordingly results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁸ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order 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

⁵ The Custodian’s response contained records responsive both to this request and the related request of GRC Complaint No. 2015-331, adjudicated at the GRC’s February 23, 2016 meeting.

⁶ The Custodian also asserted in the SOI that the request was overly broad; however, this assertion was not previously raised to contend that the OPRA request was not valid. Moreover, the Custodian did not seek clarification of the request before disclosing records that she stated were responsive to the request.

⁷ The Complainant raised additional concerns about the content of the disclosed records, which the GRC declines to adjudicate.

⁸ A custodian’s written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁹ See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

Here, the Complainant requested “purchase orders (i.e., vouchers) and accompanying invoices.” Purchase orders, vouchers, and invoices are immediate access records under N.J.S.A. 47:1A-5(e). As such, the Custodian had an obligation to respond to the request for the records immediately, either granting or denying access, requesting additional time to respond, or requesting clarification. The evidence of record reveals, however, that the Custodian did not initially respond to the Complainant’s request until August 13, 2015, which was the eighth (8th) business day following receipt of the request. Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s 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.

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.

Although the Custodian denied access to the requested records, the Council declines to order disclosure of said records because the Custodian certified that on December 11, 2015, she disclosed to the Complainant eleven (11) pages of records in redacted form that were responsive to the Complainant’s request, and there is nothing in the evidence of record disputing sufficiency of the disclosure.

⁹ OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

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 (Berg); 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, although the Custodian failed to respond to the Complainant’s request for immediate access records immediately, which resulted in in a “deemed” denial of said request, the Custodian did on December 11, 2015, disclose to the Complainant eleven (11) pages of redacted records that were responsive to the request, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s 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. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v.

NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. Although the Custodian denied the Complainant access to the requested records, the Council declines to order disclosure of said records because the Custodian certified that on December 11, 2015, she disclosed to the Complainant eleven (11) pages of redacted records that were responsive to the Complainant's request, and there is nothing in the evidence of record disputing sufficiency of the disclosure.
3. Although the Custodian failed to respond to the Complainant's request for immediate access records immediately, which resulted in in a "deemed" denial of said request, the Custodian did on December 11, 2015, disclose to the Complainant eleven (11) pages of records in redacted form that were responsive to the request, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Husna Kazmir
Staff Attorney

January 24, 2017