



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 18, 2018 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-338

v.

Kean University
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Supplemental 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 complied with the Council’s October 30, 2018 Interim Order because she responded within the extended time frame supplying the revised e-mails at issue to the Complainant and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian’s unnecessary extensions resulted in a “deemed denial” of the Complainant’s request. Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017). The Custodian also denied access to portions of the request that the Council subsequently determined via an *in camera* examination were improperly redacted. However, the Custodian timely complied with the Council’s January 20, and October 30, 2018 Interim Orders by submitting the responsive e-mails to the Council for *in camera* examination and subsequently disclosing the e-mails to the Complainant as required by the Council. Because the evidence of record does not indicate that the actions of the Custodian had a positive element of conscious wrongdoing or were intentional and deliberate, such 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 18th Day of December, 2018

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: December 20, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-338

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint:

“I request any and/or all correspondence (letters; memoranda; emails; texts) between and/or among the following individuals at Kean University on the subject of the Standard & Poor’s rating service report issued in August 2014 (keanfoundation.org/file/documents/Standard-and-Poors-2014.pdf?erid=394687). I am seeking such correspondence for the period of 2013 to the present:

Dawood Farahi [“Ms. Farahi”]; Phil Connelly [“Mr. Connelly”]; Geri Benedetto [“Ms. Benedetto”]; Jeffrey Toney [“Mr. Toney”]; Audrey Kelly [“Ms. Kelly”]; And and/or all members of the Board of Trustees; the Office of Admissions, including its director and/or the staff supervised by the director; the Budget Office, including its director and/or the staff supervised by the director; the Office of the Vice President of University Relations, including its VP and/or the staff supervised by the VP; and and/or all members of the Kean University Foundation Board of Directors.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 17, 2014

Response Made by Custodian: November 26, 2014; December 11, 2014; December 23, 2014; January 16, 2015; January 30, 2015; February 13, 2015; February 27, 2015; March 12, 2015; March 27, 2015; April 10, 2015; April 24, 2015; May 8, 2015; May 22, 2015; June 4, 2015; June 18, 2015; July 1, 2015; July 22, 2015; August 5, 2015; August 19, 2015; September 2, 2015; September 16, 2015; September 30, 2015; October 14, 2015; October 28, 2015; November 12, 2015; November 25, 2015; December 9, 2015; December 22, 2015

GRC Complaint Received: November 2, 2015

Records Submitted for *In Camera* Examination: forty-seven (47) pages of responsive records by and between several employees at Kean University from 2013 to November 17, 2014.

¹ No legal representation listed on record.

² Represented by Angela Velez, DAG.

Background

October 30, 2018 Council Meeting:

At its October 30, 2018 public meeting, the Council considered the October 23, 2018 *In Camera* Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's January 30, 2018 Interim Order because she responded within the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue for an *in camera* review, a document index, and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's November 17, 2014 OPRA request. N.J.S.A. 47:1A-6. Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); Rodriguez v. Kean Univ., GRC Complaint No. 2015-234 (September 2017). 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).
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Council Staff.³**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 31, 2018, the Council distributed its Interim Order to all parties on. On November 7, 2018, the Custodian sought an extension of time to until November 15, 2018, which the Government Records Council ("GRC") granted.

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On November 15, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian provided a copy of the revised redacted records as well as a certified confirmation of compliance to the Council Staff.

Analysis

Compliance

At its October 30, 2018 meeting, the Council ordered the Custodian to revise or remove some of the redactions made to the responsive records and provide them to the Complainant. Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the Council Staff. On October 31, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 8, 2018, accounting for the Election Day holiday.

On November 7, 2018, the fourth (4th) business day after receipt of the Council's Order, the Custodian sought an extension until November 15, 2018 to comply with the Order, which the GRC granted. On November 15, 2018 the Custodian responded to the Council's Order. Therein, the Custodian provided the revised redacted e-mails at issue to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

Therefore, the Custodian complied with the Council's October 30, 2018 Interim Order because she responded within the extended time frame supplying the revised e-mails at issue to the Complainant and simultaneously provided certified confirmation of compliance to the Council Staff.

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 unnecessary extensions resulted in a "deemed denial" of the Complainant's request. Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017). The Custodian also denied access to portions of the request that the Council subsequently determined via an *in camera* examination were improperly redacted. However, the Custodian timely complied with the Council's January 20, and October 30, 2018 Interim Orders by submitting the responsive e-mails to the Council for *in camera* examination and subsequently disclosing the e-mails to the Complainant as required by the Council. Because the evidence of record does not indicate that the actions of the Custodian had a positive element of conscious wrongdoing or were intentional and deliberate, such 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 30, 2018 Interim Order because she responded within the extended time frame supplying the revised e-mails at issue to the Complainant and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian's unnecessary extensions resulted in a "deemed denial" of the Complainant's request. Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017). The Custodian also denied access to portions of the request that the Council subsequently determined via an *in camera* examination were improperly redacted. However, the Custodian timely complied with the Council's January 20, and October 30, 2018 Interim Orders by submitting the responsive e-mails to the Council for *in camera* examination and subsequently disclosing the e-mails to the Complainant as required by the Council. Because the evidence of record does not indicate that the actions of the Custodian had a positive element of conscious wrongdoing or were intentional and deliberate, such 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: Samuel A. Rosado
Staff Attorney

December 11, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

October 30, 2018 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-338

v.

Kean University
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Findings and Recommendations of the Council Staff 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 complied with the Council’s January 30, 2018 Interim Order because she responded within the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue for an *in camera* review, a document index, and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s November 17, 2014 OPRA request. N.J.S.A. 47:1A-6. Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); Rodriguez v. Kean Univ., GRC Complaint No. 2015-234 (September 2017). 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).
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Council Staff.¹**

¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of October, 2018

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 31, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-338

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint:

“I request any and/or all correspondence (letters; memoranda; emails; texts) between and/or among the following individuals at Kean University on the subject of the Standard & Poor’s rating service report issued in August 2014 (keanfoundation.org/file/documents/Standard-and-Poors-2014.pdf?erid=394687). I am seeking such correspondence for the period of 2013 to the present:

Dawood Farahi [“Ms. Farahi”]; Phil Connelly [“Mr. Connelly”]; Geri Benedetto [“Ms. Benedetto”]; Jeffrey Toney [“Mr. Toney”]; Audrey Kelly [“Ms. Kelly”]; And and/or all members of the Board of Trustees; the Office of Admissions, including its director and/or the staff supervised by the director; the Budget Office, including its director and/or the staff supervised by the director; the Office of the Vice President of University Relations, including its VP and/or the staff supervised by the VP; and and/or all members of the Kean University Foundation Board of Directors.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 17, 2014

Response Made by Custodian: November 26, 2014; December 11, 2014; December 23, 2014; January 16, 2015; January 30, 2015; February 13, 2015; February 27, 2015; March 12, 2015; March 27, 2015; April 10, 2015; April 24, 2015; May 8, 2015; May 22, 2015; June 4, 2015; June 18, 2015; July 1, 2015; July 22, 2015; August 5, 2015; August 19, 2015; September 2, 2015; September 16, 2015; September 30, 2015; October 14, 2015; October 28, 2015; November 12, 2015; November 25, 2015; December 9, 2015; December 22, 2015

GRC Complaint Received: November 2, 2015

Records Submitted for *In Camera* Examination: forty-seven (47) pages of responsive records by and between several employees at Kean University from 2013 to November 17, 2014.

¹ No legal representation listed on record.

² Represented by Angela Velez, DAG.

Background

January 30, 2018 Council Meeting:

At its January 30, 2018 public meeting, the Council considered the January 23, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.
2. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that said records are exempt from disclosure as intra-agency advisory, consultative, or deliberative material and attorney-client privileged material. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) unredacted copies of the records responsive to the request, a document or redaction index listing each of the responsive records⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 1, 2018, the Council distributed its Interim Order to all parties on. On February 8, 2018, Custodian's Counsel sought an extension of time until February 15, 2018, which the Government Records Council ("GRC") granted.

On February 15, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian provided nine (9) copies of the redacted and unredacted e-mails at issue for an *in*

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

camera review and a document index. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.

Analysis

Compliance

At its January 30, 2018 meeting, the Council ordered the Custodian to provide nine (9) copies of the redacted and unredacted e-mails at issue here for an *in camera* review and a document index. Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the Council Staff. On February 1, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 8, 2018.

On February 8, 2018, the fifth (5th) business day after receipt of the Council's Order, Custodian's Counsel sought an extension until February 15, 2018 to comply with the Order, which the GRC granted. On February 15, 2018 the Custodian responded to the Council's Order. Therein, the Custodian provided nine (9) copies of both the redacted and unredacted e-mails at issue here and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's January 30, 2018 Interim Order because she responded within the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue for an *in camera* review, a document index, and simultaneously provided certified confirmation of compliance to the Council Staff.

Unlawful Denial of Access

Extensions of Time to Respond

OPRA mandates that a custodian must either 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 within the required seven (7) business days 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).⁶ 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 dated October 31, 2007).

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

⁶ 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.

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 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. N.J. 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. N.J. 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. N.J. 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 extensions of time as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
November 26, 2014	December 11, 2014	So that the OPRA request may “be appropriately processed.”
December 11, 2014	December 23, 2014	So that the OPRA request may “be appropriately processed.”
December 23, 2014	January 16, 2015	So that the OPRA request may “be appropriately processed,” and as a result of the impending 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 12, 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 1, 2015	So that the OPRA request may “be appropriately processed.”
July 1, 2015	July 22, 2015	So that the OPRA request may “be appropriately processed.”
July 22, 2015	August 5, 2015	So that the OPRA request may “be appropriately processed.”
August 19, 2015	September 2, 2015	So that the OPRA request may “be appropriately processed.”
September 2, 2015	September 16, 2015	So that the OPRA request may “be appropriately processed.”

September 16, 2015	September 30, 2015	So that the OPRA request may “be appropriately processed.”
September 30, 2015	October 14, 2015	So that the OPRA request may “be appropriately processed.”
October 14, 2015	October 28, 2015	So that the OPRA request may “be appropriately processed.”
October 28, 2015	November 12, 2015	So that the OPRA request may “be appropriately processed.”
November 12, 2015	November 25, 2015	So that the OPRA request may “be appropriately processed.”
November 25, 2015	December 9, 2015	So that the OPRA request may “be appropriately processed.”
December 9, 2015	December 23, 2015	So that the OPRA request may “be appropriately processed.”

The Complainant’s OPRA request sought correspondence from 2013 through November 2014 between Kean employees regarding a report from Standard & Poor’s. The Custodian extended the response time on twenty-six (26) occasions before responding on December 22, 2015 stating that no records existed. Those extensions amounted to 267 business days.⁷ As noted above, a requestor’s approval is not required for a valid extension. The GRC notes, however, that the Complainant did not object to the Custodian’s extensions of time prior to filing this complaint.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

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2015-234 (September 2017) for instruction. There, the Council found that the Custodian’s approximately 200 business day extension to produce responsive records was unreasonable. The Council also took the custodian to task for lacking urgency in responding. The GRC sees the facts here as similar to Rodriguez. Here, the Custodian ultimately sought 267 business days, responding more than a year after receiving the OPRA request. While the Custodian’s search (conducted with assistance of several other offices) for communications (inclusive of hardcopy documents) could reasonably have been time consuming, the Custodian’s extension letters lacked any explanation, nor did they provide the Complainant with an update as to whether documents had been received or were under review.

⁷ The time period accounts for public holidays that may have occurred.

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*.

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 November 17, 2014 OPRA request. N.J.S.A. 47:1A-6. Ciccarone, GRC 2013-280; Rodriguez, 2015-234. 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).

Attorney-Client Communications & Advisory, Consultative, and Deliberative Material

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. N.J.S.A. 47:1A-6.

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those "which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that "the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

Further, OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative ["ACD"] material." When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. *Id.* at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” *Id.* at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. *Id.* at 286-87.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Redaction	Custodian’s Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination¹⁰
2015-338 NR001	E-mail from Ms. Benedetto to Mr. Connelly, cc’ing Sharon Santora (“Ms. Santora”) and Jennifer Soyka (“Ms. Soyka”), dated October 24, 2014 (9:46 a.m.). E-mail from Custodian’s Counsel to Ms.	Attorney-client communications, and internal agency communications, regarding e-mail with subject “It appears Kean misled S&P on an S&P ratings report.”	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u>	The first redaction contains the opinion of Ms. Benedetto, the Chief University Counsel. This paragraph can be reasonably construed to be Ms. Benedetto’s legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the first redaction. <u>N.J.S.A. 47:1A-1.1</u> . The second redaction contains a reply from Custodian’s Counsel. This redaction does

¹⁰ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	Benedetto, dated October 24, 2014 (9:44 a.m.).			not contain information that can be reasonably construed as attorney-client privileged communications or ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u>
2015-338 NR002	E-mail from Ms. Benedetto to Custodian’s Counsel, dated October 24, 2014 (9:41 a.m.). E-mail from Custodian’s Counsel to Ms. Benedetto, dated October 23, 2014 (5:56 p.m.).	Attorney-client communications regarding e-mail with subject “It appears Kean misled S&P on an S&P ratings report.”	Any record within the attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u>	The first redaction is an opinion from Ms. Benedetto. This statement can be reasonably construed to be Ms. Benedetto’s legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the first redaction. <u>N.J.S.A. 47:1A-1.1.</u> The second redaction is a paragraph from the Custodian’s Counsel to Ms. Benedetto, explaining legal procedure. This paragraph can be reasonably construed to be the Custodian’s Counsel’s legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the second redaction. <u>N.J.S.A. 47:1A-1.1.</u>
2015-338 NR003	E-mail from Ms. Benedetto to Custodian’s Counsel, dated October 23, 2014 (5:24 p.m.). E-mail from Custodian’s Counsel to Ms. Benedetto, dated October 23, 2014 (1:02 p.m.).	Attorney-client communications regarding e-mail with subject “It appears Kean misled S&P on an S&P ratings report.”	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u>	The first redaction is an opinion from Ms. Benedetto. This statement can be reasonably construed to be Ms. Benedetto’s legal opinion on the topics identified, as well as seeking legal advice. Thus, the Custodian lawfully denied access to the first redaction. <u>N.J.S.A. 47:1A-1.1.</u> The second redaction is a statement from the Custodian’s Counsel to Ms. Benedetto, explaining legal procedure. This statement can be reasonably construed to be the

				Custodian’s Counsel’s legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the second redaction. <u>N.J.S.A. 47:1A-1.1.</u>
2015-338 NR005	E-mail from Mr. Connelly to Ms. Benedetto, dated October 24, 2014 (12:10 p.m.).	E-mail seeking direction on follow-up response submission with attachments.	Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A. 47:1A-1.1</u>	The statement can be reasonably construed to be a request for legal advice on a draft correspondence. Thus, the Custodian lawfully denied access to the redacted information. <u>N.J.S.A. 47:1A-1.1.</u>
2015-338 NR006 through 2015-338 NR009	Draft documents attached to preceding e-mail.	Draft documents for review and editing.	Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A. 47:1A-1.1</u>	As the redacted information consisted of draft documents, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
2015-338 NR010	E-mail chain from Mr. Connelly to Ms. Benedetto, cc’ing Ms. Santora, Felice Vazquez (“Ms. Vazquez”), and JoAnn Pobuta (“Ms. Potuba”), dated October 24, 2014 (12:23 p.m.).	Attorney-client communications regarding e-mail with subject “It appears Kean misled S&P on an S&P ratings report.”	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u>	The first and second redaction do not contain information that can be reasonably construed as attorney-client privileged communications or ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u> The third redaction is a statement from the Custodian’s Counsel to Ms. Benedetto, explaining legal procedure. This statement can be reasonably construed to be the Custodian’s Counsel’s legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the third redaction. <u>N.J.S.A. 47:1A-1.1.</u>
2015-338 NR012	E-mail chain from Ms. Benedetto to Ms. Vazquez, cc’ing Mr.	Attorney-client communications regarding past OPRA requests.	Any record within the attorney-client privilege.	Both redactions notes the attached records as previous OPRA requests and responses. Neither redaction contains

	<p>Connelly and Ms. Santora, dated October 24, 2014 (12:54 p.m.)</p> <p>Note: Item No. 2015-338 NR013 included in e-mail chain.</p>		<p><u>N.J.S.A. 47:1A-1.1</u></p>	<p>information that can be reasonably construed as attorney-client privileged communications. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u></p>
<p>2015-338 NR013</p>	<p>E-mail from Ms. Benedetto to Meaghan Lenahan and the Custodian, cc'ing Ms. Santora and Faruque Chowdhury, dated October 24, 2014 (12:22 p.m.).</p> <p>E-mail from Custodian's Counsel to Ms. Benedetto, dated October 23, 2014 (1:02 p.m.).</p>	<p>Attorney-client communications regarding past OPRA requests. Attorney-client communications regarding e-mail with subject "It appears Kean misled S&P on an S&P ratings report."</p>	<p>Any record within the attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u></p>	<p>The first redaction is a request for a copy of an OPRA request. The redaction does not contain information that can be reasonably construed as attorney-client privileged communications. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u></p> <p>The second redaction is a statement from the Custodian's Counsel to Ms. Benedetto, explaining legal procedure. This statement can be reasonably construed to be the Custodian's Counsel's legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the second redaction. <u>N.J.S.A. 47:1A-1.1.</u></p>
<p>2015-338 NR020</p>	<p>E-mail chain from Ms. Benedetto to Ms. Vazquez, cc'ing Mr. Connelly and Ms. Santora, dated October 24, 2014 (12:56 p.m.)</p>	<p>Attorney-client communications regarding e-mail with subject "It appears Kean misled S&P on an S&P ratings report."</p>	<p>Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u></p>	<p>The first redaction is a description of the enclosed attachment. The redaction does not contain information that can be reasonably construed as attorney-client privileged communications or ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u></p> <p>The second redaction is a statement from the Custodian's Counsel to Ms. Benedetto,</p>

				<p>explaining legal procedure. This statement can be reasonably construed to be the Custodian’s Counsel’s legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the second redaction. <u>N.J.S.A. 47:1A-1.1.</u></p>
<p>2015-338 NR024</p>	<p>E-mail chain from Mr. Connelly to Ms. Santora, Ms. Vazquez, and Ms. Benedetto, dated October 24, 2014 (2:16 p.m.)</p> <p>Note: Item Nos. 2015-338 NR025 & NR026 included in e-mail chain.</p>	<p>Internal communication regarding e-mail with subject “It appears Kean misled S&P on an S&P ratings report.”</p>	<p>Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u></p>	<p>The first redaction is a statement on the availability for a meeting. The redaction does not contain information that can be reasonably construed as attorney-client privileged communications or ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u></p> <p>The second redaction reflects the contents of a telephone conversation regarding the pertinent topic. The first two paragraphs contained in the redaction comprise ACD material and therefore the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>However, the third paragraph in the second redaction pertains to scheduling a meeting with other parties, and does not elicit any ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u></p>
<p>2015-338 NR025</p>	<p>E-mail from Ms. Vazquez to Ms. Benedetto, cc’ing Ms. Santora and Mr. Connelly, dated October 24, 2014 (1:03 p.m.).</p>	<p>Internal communication regarding e-mail with subject “It appears Kean misled S&P on an S&P ratings report.”</p>	<p>Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-</p>	<p>The first redaction contains legal advice and opinion regarding the relevant topics and a status update. Therefore, the Custodian lawfully denied access to the first redaction.</p>

	E-mail from Ms. Benedetto to Ms. Vazquez, cc'ing Mr. Connelly and Ms. Santora, dated October 24, 2014 (12:56 p.m.)		client privilege. <u>N.J.S.A.</u> 47:1A-1.1	The second redaction is a description of the enclosed attachment. The redaction does not contain information that can be reasonably construed as attorney-client privileged communications or ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A.</u> 47:1A-6.
2015-338 NR026	E-mail from Custodian's Counsel to Ms. Benedetto, dated October 23, 2014 (1:02 p.m.).	Attorney-client communications regarding e-mail with subject "It appears Kean misled S&P on an S&P ratings report."	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	The redaction is a statement from the Custodian's Counsel to Ms. Benedetto, explaining legal procedure. This statement can be reasonably construed to be the Custodian's Counsel's legal opinion on the topics identified. Thus, the Custodian lawfully denied access to the second redaction. <u>N.J.S.A.</u> 47:1A-1.1.
2015-338 NR027	E-mail chain from Mr. Connelly to Ms. Benedetto, Ms. Kelly, Ms. Vazquez, Ms. Santora, and Ms. Soyka, dated October 28, 2014 (4:15 p.m.).	Internal communication regarding e-mail with subject "It appears Kean misled S&P on an S&P ratings report."	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	The first redaction is an opinion on the attached draft document. Therefore, it is ACD material, and the Custodian lawfully denied access. <u>N.J.S.A.</u> 47:1A-1.1. The second redaction is a solicitation for an opinion on the attached draft document. Therefore, it is also ACD material, the Custodian lawfully denied access. <u>N.J.S.A.</u> 47:1A-1.1.
2015-338 NR028 through 2015-338 NR029	Draft correspondence attached to preceding e-mail.	Draft messages for review and editing.	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-	As the redacted information consisted of draft documents, the Custodian lawfully denied access. <u>N.J.S.A.</u> 47:1A-1.1.

			client privilege. <u>N.J.S.A.</u> 47:1A-1.1	
2015-338 NR030	E-mail chain from Mr. Connelly to Ms. Benedetto, cc'ing Ms. Soyka, dated October 28, 2014 (6:03 p.m.)	E-mail subject lines and internal attorney-client communications discussing strategic proposals.	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	As the Custodian claimed, the redactions pertain to a proposed legal strategy. Therefore, the Custodian lawfully denied access. <u>N.J.S.A.</u> 47:1A-1.1.
2015-338 NR031	E-mail chain from Mr. Connelly to Ms. Benedetto, cc'ing Ms. Soyka, dated October 29, 2014 (10:11 p.m.). Note: Item No. 2015-338 NR032 included in e-mail chain.	E-mail subject lines and internal attorney-client communications discussing strategic proposals.	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	As the Custodian claimed, the redactions pertain to a proposed legal strategy. Therefore, the Custodian lawfully denied access. <u>N.J.S.A.</u> 47:1A-1.1.
2015-338 NR032	E-mail from Ms. Benedetto to Mr. Connelly, cc'ing Ms. Soyka, dated October 28, 2014 (3:25 p.m.).	E-mail subject lines and internal attorney-client communications discussing strategic proposals.	Inter-agency or intra-agency advisory, consultative or deliberative material; Any record within the attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	As the Custodian claimed, the redactions pertain to a proposed legal strategy. Therefore, the Custodian lawfully denied access. <u>N.J.S.A.</u> 47:1A-1.1.
2015-338 NR033	E-mail from Mr. Connelly to Alyce Franklin-Owens ("Ms. Franklin-Owens") and Ms. Santora, dated	Internal communication seeking additional information on	Inter-agency or intra-agency advisory, consultative or deliberative material.	The redaction is a request for the actual amount for fees charged by Kean in 2015. The redaction does not contain information that can be reasonably construed as ACD

	July 15, 2014 (9:31 a.m.).	follow-up responses.	<u>N.J.S.A.</u> 47:1A-1.1	material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u>
2015-338 NR034	E-mail from Ms. Franklin-Owens to Mr. Connelly and Ms. Santora, dated July 14, 2014 (11:40 a.m.). Note: Item No. 2015-338 NR035 is a continuation of this e-mail.	Internal communication providing responses to a list of questions.	Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A.</u> 47:1A-1.1	The redaction consists of responses to a series of financial and budgetary questions regarding Kean. The redaction does not contain information that can be reasonably construed as ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u>
2015-338 NR 035	E-mail from Ms. Franklin-Owens to Mr. Connelly and Ms. Santora, dated July 14, 2014 (11:40 a.m.).	Internal communication providing responses to a list of questions.	Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A.</u> 47:1A-1.1	The redaction is a response to questions regarding Kean's budget and accrual projections. The redaction does not contain information that can be reasonably construed as ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u>
2015-338 NR036	E-mail from Ms. Franklin-Owens to Ms. Connelly and Ms. Santora, dated July 15, 2014 (10:59 a.m.).	Internal communication providing updated responses to a list of questions.	Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A.</u> 47:1A-1.1	The redaction contains a list of fees imposed by Kean. The redaction does not contain information that can be reasonably construed as ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u>
2015-338 NR037	E-mail from Mr. Connelly to Mr. Toney, Janice Murray-Laury, Ms. Kelly, Carla Willis, and Ms. Vazquez, dated August 8, 2014 (6:14 p.m.). Note: Item No. 2015-338 NR038	Internal communication providing direction to subordinates.	Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A.</u> 47:1A-1.1	The redaction is a request to disseminate an attached document. The redaction does not contain information that can be reasonably construed as ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u>

	included in e-mail chain.			
2015-338 NR038	<p>E-mail from Shivani Singh (“Ms. Singh”) to Ms. Santora, cc’ing Mr. Connelly and Stephanie Wang, dated August 8, 2014 (5:23 p.m.).</p> <p>E-mail from Ms. Santora to Ms. Singh, dated August 6, 2014 (12:45 p.m.).</p>	Communication regarding Standard & Poor’s report.	Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A. 47:1A-1.1</u>	<p>The first redaction references the attached document. The redaction does not contain information that can be reasonably construed as ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u></p> <p>The second redaction is a request for a copy of an official report. The redaction does not contain information that can be reasonably construed as ACD material. Thus, the Custodian unlawfully denied access to the redacted content. <u>N.J.S.A. 47:1A-6.</u></p>

Accordingly, the Custodian unlawfully denied access to a portion of the requested redactions, and lawfully denied access to other portions. N.J.S.A. 47:1A-1.1. The Custodian shall thus comply with the findings of the *In Camera* Examination set forth in the above table.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s January 30, 2018 Interim Order because she responded within the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue for an *in camera* review, a document index, and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s November 17, 2014 OPRA request. N.J.S.A. 47:1A-6. Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); Rodriguez v. Kean Univ., GRC Complaint No. 2015-234 (September 2017). 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).

3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Council Staff.¹¹**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

October 23, 2018

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-338

v.

Kean University
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 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 determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.
2. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian’s assertion that said records are exempt from disclosure as intra-agency advisory, consultative, or deliberative material and attorney-client privileged material. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) unredacted copies of the records responsive to the request, a document or redaction index listing each of the responsive records², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2018

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 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-338

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint:

“I request any and/or all correspondence (letters; memoranda; emails; texts) between and/or among the following individuals at Kean University on the subject of the Standard & Poor’s rating service report issued in August 2014 (keanfoundation.org/file/documents/Standard-and-Poors-2014.pdf?erid=394687). I am seeking such correspondence for the period of 2013 to the present:

Dawood Farahi; Phil Connelly; Geri Benedetto; Jeffrey Toney; Audrey Kelly; And and/or all members of the Board of Trustees; the Office of Admissions, including its director and/or the staff supervised by the director; the Budget Office, including its director and/or the staff supervised by the director; the Office of the Vice President of University Relations, including its VP and/or the staff supervised by the VP; and and/or all members of the Kean University Foundation Board of Directors.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 17, 2014

Response Made by Custodian: November 26, 2014; December 11, 2014; December 23, 2014; January 16, 2015; January 30, 2015; February 13, 2015; February 27, 2015; March 12, 2015; March 27, 2015; April 10, 2015; April 24, 2015; May 8, 2015; May 22, 2015; June 4, 2015; June 18, 2015; July 1, 2015; July 22, 2015; August 5, 2015; August 19, 2015; September 2, 2015; September 16, 2015; September 30, 2015; October 14, 2015; October 28, 2015; November 12, 2015; November 25, 2015; December 9, 2015; December 22, 2015

GRC Complaint Received: November 2, 2015

¹ No legal representation listed on record.

² Represented by Angela Velez, DAG.

Background³

Request and Response:

On November 14, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 26, 2014, the Custodian responded in writing, seeking an extension of time to until December 11, 2014, to respond to the Complainant’s request. The Custodian then sought additional extensions of time on December 11, 2014, December 23, 2014, January 16, 2015, January 30, 2015, February 13, 2015, February 27, 2015, March 12, 2015, March 27, 2015, April 10, 2015, April 24, 2015, May 8, 2015, May 22, 2015, June 4, 2015, June 18, 2015, July 1, 2015, July 22, 2015, August 5, 2015, August 19, 2015, September 2, 2015, September 16, 2015, September 30, 2015, October 14, 2015, and October 28, 2015.

Denial of Access Complaint:

On November 2, 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 has sent correspondence extending the time to respond twenty-five (25) times, with the last extension noticed on October 28, 2015.

The Complainant argued that a Custodian’s request for an extension must be reasonable and that repeated extensions spanning nearly a year are not reasonable. The Complainant therefore asserted that the Custodian knowingly and willfully violated OPRA by using these extensions to deny access to his OPRA request.

Supplemental Response:

The Custodian sought additional extensions of time on November 12, 2015, November 25, 2015, and December 9, 2015. On December 22, 2015, the Custodian produced forty-seven (47) pages of responsive records with redactions. The Custodian stated that the redactions were made pursuant to N.J.S.A. 47:1A-1.1(1) and (7).

Statement of Information:

On December 22, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 17, 2014. The Custodian then certified that she delivered the OPRA request to the named individuals on November 25, 2014. According to the Custodian, initial responses from the Admissions Office and the Office of University Relations confirmed that neither office had responsive records. The Custodian also received responses from the named individuals, but relayed that it would take time to identify and compile documents response to the request. Therefore, the Custodian certified that extensions of time were necessary to fulfill the request, through the end of the year.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

On January 5, 2015, the Custodian received potentially responsive records from the Office of Human Resources (“OHR”). However, the Custodian certified that because she hadn’t received responses from other individuals, additional extensions of time were needed, through March 12, 2015. On March 20, 2015, the Custodian certified that she received 200 pages of documents from the OHR. The Custodian then extended the time to respond through August 2015 to review the documents for responsiveness and potential redactions. On or around August and September 2015, the Custodian met with a number of the identified individuals to further review the responsive documents. The Custodian certified that additional extensions were noticed to the Complainant from September 2015 through December 2015, with a disposition letter and forty-seven (47) responsive records provided to the Complainant on December 22, 2015.

The Custodian initially argued that since responsive records were provided, this matter should be dismissed as moot, since the Complainant is not in possession of the records sought. Regarding the extensions of time, the Custodian asserted that she is granted the ability to extend the time to respond as necessary under OPRA. N.J.S.A. 47:1A-5. The Custodian noted that such extensions are subject to reasonableness and factors such as the breadth and specificity of the request, and whether the records are located within the agency or off-site. See N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div.), certif. denied, 190 N.J. 394 (2007). Here, the Custodian asserted that the request was for records spanning for more than a year, spanning numerous individuals. Additionally, the Custodian claimed that she kept the Complainant informed of the status of the request throughout, and ultimately provided the responsive records when the review concluded.

On the matter of the redactions, the Custodian asserted that such redactions based upon attorney-client privilege and advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. Of those records redacted under attorney-client privilege, the Custodian contended that they comprised of e-mail correspondence between employees, officers and/or agents of Kean University, and Kean University’s Chief Counsel, Associate General Counsel, and the University’s DAG representative. Specifically, the Custodian claimed that the e-mails contained advice on what information the University provides to Standard and Poor’s (“S&P”).

Lastly, the Custodian claimed that the e-mails included draft correspondence from the University to S&P and conversations amongst University staff on what information to provide to S&P. The Custodian contended that these conversations qualify as “advisory opinions, recommendations, and deliberations comprising part of a process by which [its] decisions and policies are formulated.” In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). The Custodian also stated that the e-mails included draft documents, which are not subject to disclosure under the deliberative process privilege. See Ciesla v. N.J. Dep’t of Health and Senior Servs., 198 N.J. Super. 127, 137 (App. Div. 2012).

Additional Submissions:

On January 5, 2018, the Complainant e-mailed the GRC regarding the current matter. The Complainant wished to provide supplemental documentation and argument, attaching the forty-seven (47) responsive documents with redactions the Custodian provided to him. The Complainant

contended that the Custodian failed to provide an Vaughn Index, explaining the justification for each redaction for reach e-mail.

Analysis

Timeliness

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 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.*

In the instant matter, the Complainant ultimately received the responsive records on December 22, 2015, subsequently after the Complainant filed his Denial of Access Complaint. Thereafter, the Complainant argued that the Custodian challenged the redactions made to the records.

Therefore, the determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.

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.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason

⁴ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian argued produced forty-seven (47) responsive records to the Complainant's OPRA request. In her SOI, the Custodian stated that the redactions made to the records were lawful because the those portions of the e-mails constituted ACD and attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

Accordingly, the GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that said records are exempt from disclosure as ACD and attorney-client privileged material. See Paff, 379 N.J. Super. 346 and N.J.S.A. 47:1A-1.1.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.
2. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that said records are exempt from disclosure as intra-agency advisory, consultative, or deliberative material and attorney-client privileged material. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) unredacted copies of the records responsive to the request, a document or redaction index listing each of the responsive records⁶, as well as a legal**

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

January 23, 2018

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."