



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-345

v.

Kean University
Custodian of Record

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 immediate access to the requested records, the Council declines to order disclosure of said records because the Custodian certified that on December 21, 2015, she disclosed to the Complainant thirteen (13) pages of redacted records form that were responsive to the Complainant’s request, and there is nothing in the evidence of record disputing sufficiency of the disclosure. Additionally, while the Complainant disputed the Custodian’s need for three (3) extensions in this matter (after receiving the responsive documents), the Custodian certified in her SOI that processing the request required contacting the Office of Record to conduct a search for records spanning more than a year and a review and redaction process.
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 21, 2015, disclose to the Complainant thirteen (13) 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.

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 F. Rodriguez¹
Complainant**

GRC Complaint No. 2015-345

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: A copy of the activity statements (usually sent monthly to the cardholder) for the Kean University credit cards used by Phil Connelly for the period from September 2014 to the most recently available statement.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: October 26, 2016
Response Made by Custodian: November 5, 2016
GRC Complaint Received: November 9, 2015

Background³

Request and Response:

On October 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 5, 2016, the Custodian responded in writing, advising the Complainant that an extension of time until November 19, 2015 would be necessary to process the OPRA request appropriately. After the initial response, the Custodian requested three (3) additional extensions of time, totaling about one (1) month in the aggregate.

On December 21, 2015, the Custodian responded to the Complainant’s request, attaching eleven (13) pages of responsive documents with redactions made pursuant to N.J.S.A. 47:1A-1.1(16).

Denial of Access Complaint:

On November 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer MacGruther.

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.

November 5, 2015 letter, extending the response date to November 19, 2016, was a violation of OPRA. He argued that the responsive records were bills or vouchers (in this case, credit card statements), 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. He contended that by failing to supply the requested documents immediately, the Custodian was in violation of OPRA.

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 October 26, 2015. The Custodian certified that she responded in writing on November 5, 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 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.
- On December 16, 2015, an additional extension of time was needed until December 23, 2015.

The Custodian certified that the multiple extensions of time were required because she needed to obtain the records through the University’s Office of Record. The Custodian averred that she was in continued communication with the Office of Record throughout the extension period and received documents responsive to the request on December 17, 2015. The Custodian certified that thereafter the records were reviewed and redacted. The Custodian certified that she e-mailed the Complainant thirteen (13) pages of redacted records responsive to the request on December 21, 2015, redacted pursuant to N.J.S.A. 47:1A-1.1 (16) because of personal identifying information consisting of account numbers.

The Custodian additionally advised that the extensions were necessary because the request was for records spanning more than a year. The Custodian argued that because the records were disclosed to the Complainant in a timely manner, and he was now in possession of the records, the complaint was moot.

Additional Submissions:

On January 20, 2016, the Complainant responded to the Custodian’s SOI. He disputed her assertion that retrieving the requested credit card statements would substantially disrupt operations at Kean, and challenged that they would have been transferred to a “hard to retrieve from” storage area, due to being recent statements. He argued that this request was quite specific and that the circumstances of his request did not match the circumstances in the N.J. Builders case cited by the Custodian. He asked that the GRC reject the Custodian’s use of the N.J. Builders decision.

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).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁵ 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 notify the complainant immediately as to the status of immediate access records.

Here, the Complainant requested credit card statements of a specific individual. 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, 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 November 5, 2015, which was the seventh (7th) 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.

⁴ 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.

⁵ 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).

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 the Complainant immediate access to the requested records, the Council declines to order disclosure of said records because the Custodian certified that on December 21, 2015, she disclosed to the Complainant thirteen (13) 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. Additionally, while the Complainant disputed the Custodian’s need for three (3) extensions in this matter (after receiving the responsive documents), the Custodian certified in her SOI that processing the request required contacting the Office of Record to conduct a search for records spanning more than a year and a review and redaction process.

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 a “deemed” denial of said request,

the Custodian did on December 21, 2015, disclose to the Complainant thirteen (13) 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).
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Prepared By: Husna Kazmir
Staff Attorney

January 24, 2017