



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

April 25, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2015-407

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 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 two (2) OPRA requests. 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 requests pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 6, 2015.
2. The Custodian failed to respond immediately to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 6, 2015. Further, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of April, 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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-407

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of:

1. Any and/or all purchase orders, with accompanying vouchers, related to payments made to Kean University Foundation (“Foundation”) with monies paid to Kean University (“Kean”) by the Township of Elizabeth (“Township”) for providing the Township with Information Technology (“IT”), data processing, and telecommunications services from fiscal year 2006 through 2013.
2. Any and/or all purchase orders, with accompanying vouchers, related to payments made to the Foundation with monies paid to Kean by Union County (“County”) for providing the County IT, data processing, and telecommunications services from 2006 through 2013.

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: April 7, 2015
Response Made by Custodian: April 16, 2015
GRC Complaint Received: December 18, 2015

Background³

Request and Response:

On April 7, 2015, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On April 16, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until April 30, 2015, would be necessary to process the OPRA requests appropriately. On April 30, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until May 14, 2015, would be necessary to process the OPRA requests appropriately. On May

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

14, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until May 28, 2015, would be necessary to process the OPRA requests appropriately. On May 28, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until June 11, 2015, would be necessary to process the OPRA requests appropriately. On June 11, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until June 25, 2015, would be necessary to process the OPRA requests appropriately.

On June 25, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until July 9, 2015, would be necessary to process the OPRA requests appropriately. On July 9, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until July 28, 2015, would be necessary to process the OPRA requests appropriately. On July 28, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until August 11, 2015, would be necessary to process the OPRA requests appropriately. On August 11, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until August 25, 2015, would be necessary to process the OPRA requests appropriately. On August 25, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until September 8, 2015, would be necessary to process the OPRA requests appropriately. On September 8, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until September 22, 2015, would be necessary to process the OPRA requests appropriately. On September 22, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until October 6, 2015, would be necessary to process the OPRA requests appropriately.

On October 6, 2015, the Custodian responded in writing, granting access to ten (10) pages of responsive records for each request, totaling twenty (20) pages. The Custodian noted that checks were “provided in accordance with the New Jersey retention schedules.”

Denial of Access Complaint:

On December 18, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian untimely responded to his OPRA request because the responsive records were vouchers classified as “immediate access” records. N.J.S.A. 47:1A-5(e). The Complainant further argued that the extension of time appeared to be unreasonable, noting that he sought recent records. The Complainant argued that the Custodian failed to identify a legitimate reason for the extension. Additionally, the Complainant contended that the Custodian failed to attempt to reach a reasonable accommodation.

Statement of Information:

On January 14, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on April 7, 2015. The Custodian affirmed that two (2) other related OPRA requests were received on the same day. The Custodian certified that she forwarded all of the OPRA requests to George Thorn, Director of University Purchasing, on the same day as receipt. The Custodian certified that she received records on April 10, 2015, but that it was determined that none were responsive to the subject

OPRA requests. The Custodian certified that she responded to the Complainant in writing on April 16, 2015, seeking an extension of time to seek additional records. The Custodian certified that she sent an e-mail to Mr. Thorn on April 30, 2015, seeking a status update and simultaneously sought another extension of time. The Custodian certified that she received additional records from the Office of Human Resources in May 2015 that did not constitute a complete response; thus, she sought extensions through the month.

The Custodian affirmed that she continued to receive additional records through May and sent another e-mail to Mr. Thorn on June 2, 2015, seeking additional information about the responsive records. The Custodian certified that she continued to seek extensions through August 2015. The Custodian certified that once she identified the responsive purchase orders, she e-mailed the General Accounting Office on August 25, 2015, to obtain the related vouchers. The Custodian certified that in September 2015, she sought additional extensions to allow time for review of the vouchers provided by General Accounting. The Custodian certified that she provided twenty (20) pages of responsive records on October 6, 2015, after receiving confirmation that all available records were collected.

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

Additionally, the Custodian argued that she timely responded to the Complainant's OPRA request. The Custodian stated that, notwithstanding OPRA's "immediate access" requirement for "vouchers," the courts have found circumstances justifying a delay in a custodian's response to such. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191 (App. Div. 2002). The Custodian asserted that in Courier Post, the Appellate Division evaluated the defendants' ability to comply with an OPRA request for "immediate access" records, dependent on, among other factors, the amount of time to "monitor the inspection or examination . . ." Id. at 199. The Custodian contended that the OPRA requests here sought unspecified purchase orders and vouchers spanning eight (8) years. The Custodian further contended that the second (2nd) OPRA request sought payments made to Kean for Foundation IT services, which required an additional level of analysis.

The Custodian contended that OPRA allows for extensions under appropriate circumstances. N.J.S.A. 47:1A-5(i); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 178 (App. Div. 2007)("[t]here is an obvious connection between the specificity of the request and a custodian's ability to provide a prompt reply"). The Custodian argued that the Complainant's two (2) OPRA requests seeking unspecified purchase orders and vouchers for an eight (8) year period required substantial effort to fulfill. The Custodian contended that she continually updated the Complainant on the status of his OPRA requests and provided access to them upon receipt. The Custodian contended that, based on the foregoing, she did not unlawfully deny access to any records and did not knowingly and willfully violate OPRA.

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

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007)(holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records).

Here, the Complainant requested "purchase orders, with accompanying vouchers," related to payments made to Kean for Foundation IT services by the Township and County. Such records are "subject to immediate access." N.J.S.A. 47:1A-5(e). Although the Custodian argued in the SOI that the Complainant's OPRA request fell outside of the "ordinary" standard, she still had an obligation to respond to the request for the records immediately, granting or denying access, requesting additional time to respond, or requesting clarification. The evidence of record reveals, however, that the Custodian did not initially respond to the Complainant's request seeking an extension to respond until April 16, 2015, which was the seventh (7th) business day following receipt of the request. Although within the normal statutory time frame, the Custodian had "an obligation to immediately" respond to a Complainant, either granting access, denying access, seeking clarification, or requesting an extension time (which she ultimately did). See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012).

⁵ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

⁶ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's two (2) OPRA requests. 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 requests pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98 and Harris, GRC 2011-65. See also Herron, GRC 2006-178. However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 6, 2015.

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

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian failed to respond immediately to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 6, 2015. Further, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's two (2) OPRA requests. 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 requests pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). *See Cody v. Middletown Twp. Pub. Sch.*, GRC Complaint No. 2005-98 (December 2005) and *Harris v. NJ Dep't of Corr.*, GRC Complaint No. 2011-65 (August 2012). *See also Herron v. Twp. of Montclair*, GRC Complaint No. 2006-178 (February 2007). However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 6, 2015.

2. The Custodian failed to respond immediately to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 6, 2015. Further, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

April 18, 2017