



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

September 26, 2017 Government Records Council Meeting

Luis Rodriguez

Complainant

v.

Kean University

Custodian of Record

Complaint No. 2015-77

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 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 November 4, 2014 OPRA request, based upon the unreasonable imposition of numerous extensions of time to respond. N.J.S.A. 47:1A-6. Ciccarone v. NJ Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). 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). However, the Council declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on April 1, 2015.
2. The Custodian violated 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) by unreasonably extending the response time by approximately five (5) months and over 100 business days. However, the Custodian ultimately produced the responsive records on April 1, 2015. Additionally, 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 do 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 26th Day of September, 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: September 29, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-77

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “I request a copy of any and/or all correspondence from 2011 to the present between Dawood Farahi, Phil Connelly, Audrey Kelly and/or her subordinates in University Relations, Jeffrey Toney, Geri Benedetto, George Thorn and/or his subordinates in Purchasing, Phyllis Duke and/or her subordinates in Operations, Faruque Chowdhury, and/or Laura Haelig to the Gruskin Group on any/or all issues related to the Shanghai Rongma Furniture Company.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 4, 2014

Response Made by Custodian: November 14, 2014; December 2, 2014; December 16, 2014; January 9, 2015; January 23, 2015; February 6, 2015; February 20, 2015; March 6, 2015; March 20, 2015; and April 1, 2015

GRC Complaint Received: March 23, 2015

Background³

Request and Response:

On November 4, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 14, 2014, the Custodian responded in writing, seeking an extension of time until December 2, 2014, to respond to the Complainant’s request. The Custodian then sought additional extensions of time on December 2, 2014, December 16, 2014, January 9, 2015, January 23, 2015, February 6, 2015, February 20, 2015, March 6, 2015, and March 20, 2015. On April 1, 2016, the deadline for the last extension, the Custodian provided ten (10) responsive records with redactions.

Denial of Access Complaint:

¹ No legal representation listed on record.

² Represented by Angela Velez, DAG.

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.

On March 23, 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 her time to respond nine (9) times. The Complainant stated that he received the first extension to respond on the seventh (7th) business day after receipt of the OPRA request and subsequently received eight (8) additional notices to extend thereafter.

The Complainant argued that a Custodian’s request for an extension must be reasonable and that repeated extensions spanning five (5) months 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.

Statement of Information:

On April 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 4, 2014. The Custodian then certified that she sought extensions of time to respond on November 14, 2014, December 2, 2014, December 16, 2014, January 9, 2015, January 23, 2015, February 6, 2015, February 20, 2015, March 6, 2015, and March 20, 2015. The Custodian claimed that this OPRA request coincided with a separate OPRA request from the Complainant seeking internal correspondence from multiple individuals spanning a number of years.

Regarding the request at issue, the Custodian certified that she initially received responsive documents from Phyllis Duke on November 15, 2014, and additional documents from George Thorn on December 9, 2014. Subsequently, the Custodian received staggered responses through March 15, 2015, from Dawood Farahi, Phil Connelly, Jeffrey Toney, Faruque Chowdhury, Audrey Kelly, Geri Benedetto, and herself. Of those responses, the Custodian certified that no responsive records exist. The Custodian further certified that she received five hundred (500) pages of e-mail correspondence involving the above individuals within the prescribed time period. According to the Custodian, additional time was necessary to review the documents to determine whether they were specifically responsive to the request and to conduct a legal review to determine whether redactions were necessary. Therefore, the Custodian extended the time to respond on nine (9) occasions as she continued to receive records from the identified individuals.

The Custodian certified that she provided ten (10) pages of responsive records to the Complainant on April 1, 2015, with three (3) of those pages containing a single redaction. The Custodian certified that the redaction is a password used by the agency to access internal digital files, and fell under OPRA’s exemption for “administrative or technical information regarding computer hardware, software, and networks which, if disclosed, would jeopardize computer security.” N.J.S.A. 47:1A-1.1.

The Custodian argued that the repeated extensions were justified on the basis that the Complainant’s request was broad and massive in scope. According to the Custodian, the Complainant’s use of “any/all” and seeking e-mails from nine (9) identified employees and

unnamed “subordinates” over a four (4) year period created a sizable pool of correspondence to locate and review. The Custodian claimed that the breadth of the request explains why responsive documents came in piecemeal from the named individuals over a span of several months. Therefore, the Custodian concluded that the extensions were necessary to conduct a complete search for documents.

Additional Submissions:

On April 10, 2015, the Complainant responded in writing to the Custodian’s SOI. The Complainant contended that the nature of his OPRA request should not be blamed for the time taken ultimately to respond. He noted that the Custodian apparently received all relevant documents in December 2014 and that it took approximately (3) months to obtain a response from the other individuals identified in the OPRA request. The Complainant contended that the Custodian did not provide evidence demonstrating an effort to ensure expedient responses from the individuals.

Analysis

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.

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.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep’t of Treas., 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 multiple extensions for the Complainant’s November 4, 2014 OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
November 14, 2014	December 2, 2014	So that the OPRA request may “be appropriately processed.”
December 2, 2014	December 16, 2014	So that the OPRA request may “be appropriately processed.”
December 16, 2014	January 9, 2015	So that the OPRA request may “be appropriately processed” and due to the University’s pending closure for holiday break.
January 9, 2015	January 23, 2015	So that the OPRA request may “be

		appropriately processed.”
January 23, 2015	February 6, 2015	So that the OPRA request may “be appropriately processed.”
February 6, 2015	February 20, 2015	So that the OPRA request may “be appropriately processed.”
February 20, 2015	March 6, 2015	So that the OPRA request may “be appropriately processed.”
March 6, 2015	March 20, 2015	So that the OPRA request may “be appropriately processed.”
March 20, 2015	April 2, 2015	So that the OPRA request may “be appropriately processed.”

The subject OPRA request sought communications by and between Kean University employees and other individuals pertaining to the Shanghai Rongma Furniture Company over a four (4) year period. The Custodian extended the response time on nine (9) occasions for a total exceeding 100 business days, accounting for public holidays. As noted above, a requestor’s approval is not required for a valid extension. However, 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. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to respond effectively to the request.⁴ Id.

In the instant matter, the evidence of record indicates that the Custodian worked with other individuals to respond to the request, forwarding the request to the named individuals on November 12, 2014. On November 14, 2014, the Custodian issued the first extension to until December 2, 2014, to await responses from the individuals and allow time to review any materials received. One of the individuals provided the Custodian with relevant documents on November 15, 2014. Another individual provided relevant documents on December 9, 2014. The Custodian then certified that she received staggered responses claiming no responsive documents exist from the remaining individuals from December 2014 through March 2015. Ultimately, the Custodian produced ten (10) responsive records to the Complainant on April 1, 2015. Of those records, three (3) contained redactions intended to prevent access to “administrative or technical information regarding computer hardware, software, and networks which, if disclosed, would jeopardize computer security.” N.J.S.A. 47:1A-1.1.

The Custodian ultimately received all relevant documents in December 2014. The remaining extensions the Custodian imposed were due to not having received responses from the other named individuals in the request. Notwithstanding the Custodian’s April 1, 2015 production, there is nothing in the record suggesting that the Custodian proactively took steps to

⁴ “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*.

obtain responses from those individuals in a timely manner. The GRC does not find it reasonable to seek more than 100 business days to obtain confirmation from those individuals and to review the relevant documents received for responsiveness and necessary redactions.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's November 4, 2014 OPRA request, based upon the unreasonable imposition of numerous extensions of time to respond. N.J.S.A. 47:1A-6. Ciccarone, GRC 2013-280. 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). However, the Council declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on April 1, 2015.

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)).

In the instant matter, the Custodian violated 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) by unreasonably extending the response time by approximately five (5) months and over 100 business days. However, the Custodian ultimately produced the responsive records on April 1, 2015. Additionally, 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 do 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 November 4, 2014 OPRA request, based upon the unreasonable imposition of numerous extensions of time to respond. N.J.S.A. 47:1A-6. Ciccarone v. NJ Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). 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). However, the Council declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on April 1, 2015.
2. The Custodian violated 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) by unreasonably extending the response time by approximately five (5) months and over 100 business days. However, the Custodian ultimately produced the responsive records on April 1, 2015. Additionally, 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 do 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

September 19, 2017