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CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 14, 2017 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2016-128

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request, based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian bore her burden of proving she did not unlawfully deny access to any responsive records because she certified in the SOI, and the record reflects, that she provided all responsive records to the Complainant. N.J.S.A. 47:1A-6; Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011). *See also* Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-184 (January 2015).

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 14th Day of November, 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: November 17, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 14, 2017 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2016-128

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of any résumés or “other biographical information” on Michael Blackwell that Kean University (“Kean”) created or shared with the public or Board of Trustee members.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: January 25, 2016
Response Made by Custodian: February 3, 2016
GRC Complaint Received: April 25, 2016

Background³

Request and Response:

On January 23, 2016 (a Saturday), the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 24, 2016, the Complainant e-mailed the Custodian, clarifying that a résumé is considered “biographical” and that media was included in the term “public.” The Complainant also stated that he wished to amend his OPRA request to include “materials” submitted to Kean by or about Mr. Blackwell that were copied or shared in the course of official business.

On February 3, 2016, the Custodian responded in writing, advising the Complainant that an extension of time until February 17, 2016, was necessary to process the OPRA request appropriately. On the same day, the Complainant e-mailed the Custodian, objecting to the extension. The Complainant noted that the Custodian had a pattern of extending time frames of two (2) weeks on a repeated basis. The Complainant stated that the extension is particularly problematic because Kean just hired Mr. Blackwell and that the press release mentioned other agencies for which he had worked.

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.

On February 17, 2016, the Custodian responded in writing, advising that an extension until March 2, 2016 was necessary to process the OPRA request appropriately. On March 2, 2016, the Custodian responded in writing, advising that an extension until March 16, 2016, was necessary to process the OPRA request appropriately. On March 16, 2016, the Custodian responded in writing, disclosing seventeen (17) pages of responsive records.

Denial of Access Complaint:

On April 25, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by continuously extending the time frame to respond to his OPRA request. The Complainant argued that the Custodian failed to identify a legitimate reason for the extensions. Additionally, the Complainant asserted that the Custodian failed to provide a definitive date on which she would disclose the responsive records, although she ultimately provided them on March 16, 2016. The Complainant also contended that the Custodian failed to attempt to reach a reasonable accommodation.

Additionally, the Complainant contended that the Custodian failed to provide all responsive records. The Complainant asserted that there is evidence in a NorthJersey.com article and in the “Comments” section of an article on “The Tower” (Kean’s newspaper) that Mr. Blackwell submitted letters of reference but that the Custodian did not disclose any such letters.

Statement of Information:

On May 26, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 25, 2016. The Custodian certified that she forwarded the Complainant’s OPRA request to the Office of the President. The Custodian affirmed that she followed up with the Office via e-mail on February 2, 2016. The Custodian certified that she responded in writing on February 3, 2016, extending the time frame to respond until February 17, 2016. The Custodian affirmed that she subsequently sought extensions on February 17 and March 2, 2016. The Custodian affirmed that she sent a follow-up e-mail to the Office on March 8, 2016. The Custodian certified that she received records from Human Resources on March 16, 2016, and disclosed them to the Complainant on that day.

The Custodian initially contended that her extensions were reasonable. NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian asserted that the Complainant failed to identify specific records. Instead, the Custodian asserted that it sought records “by or about Mr. Blackwell” that Kean created or received. The Custodian contended that, although the request was arguably invalid, she endeavored to respond.

The Custodian contended that the Complainant erroneously argued that she failed to provide all responsive records. The Custodian stated that the Complainant based his argument on “his own review and inference from third-party documents.” The Custodian argued that the facts of this case are similar to Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian stated that in Bent, the Court held that no denial of access could occur if records

“did not exist or were not in the custodian’s possession . . .” Id. at 38. The Custodian argued that the Complainant wrongly assumed that no records existed. Further, the Custodian contended that the Complainant’s dissatisfaction with the absence of additional responsive records was not a valid complaint basis. The Custodian certified that she provided all records that existed and this complaint should be dismissed as moot.

Analysis

Timeliness

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).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).

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 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:

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.

[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. 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. NJ 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. NJ 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 three (3) extensions as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
February 3, 2016	February 17, 2016	So that the OPRA request may “be appropriately processed.”
February 17, 2016	March 2, 2016	So that the OPRA request may “be appropriately processed.”
March 2, 2016	March 16, 2016	So that the OPRA request may “be appropriately processed.”

The Complainant’s OPRA request sought résumés and “other biographical information” about Mr. Blackwell. Additionally, the Complainant amended his OPRA request to seek “materials” submitted to Kean by or about Mr. Blackwell. The Custodian extended the response time on three (3) occasions before responding on March 16, 2016, disclosing seventeen (17)

pages of records. Those extensions amounted to thirty (30) business days.⁵ As noted above, a requestor's approval is not required for a valid extension. The GRC notes, however, that the Complainant objected to the Custodian's first extension of time arguing that the Custodian had a pattern of extending time frames repeatedly.⁶

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.⁷

Regarding the request, the Complainant sought "biographical information" and "materials" submitted to or created by Kean regarding Mr. Blackwell. The Custodian argued in the SOI that she needed the extensions because the request was technically invalid because it failed to identify government records.⁸ A review of the request on its face does support that a level of complexity existed; the Custodian attempted to determine which records would best fit these terms. Further, the evidence of record indicates that the Custodian worked with at least the Office of the President and Human Resources to respond to the subject OPRA request. Ultimately, Custodian certified that she twice contacted the Office of the President about the status of the OPRA request and disclosed records on March 16, 2016, immediately after Human Resources sent them to her.⁹

From the Custodian's receipt of the Complainant's OPRA request, she initially sought ten (10) business days to respond. The Custodian then sought an additional two (2) extensions of twenty (20) business days while she attempted to obtain responsive records from the Office of the President and/or Human Resources. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of one (1) full month of business days.

⁵ The time period is notwithstanding any closures or holidays that might have occurred during the time frame. The GRC notes that the Custodian provided no accounting of non-business days throughout the time frame within which she continually extended the time frame to respond.

⁶ 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.

⁷ "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*.

⁸ In situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). The GRC declines to address validity because the Custodian was able to locate responsive records.

⁹ Even if a request is invalid on its face, prevailing case law provides that a custodian cannot rely on the overly broad defense if the Custodian was able to locate responsive records. See Burke v. Brandes, 429 N.J. Super. 69 (App. Div. 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012).

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017), for instruction. There, the Council found that the Custodian's thirty-nine (39) business day extension to respond that no records exist was unreasonable. The Council also took the custodian and a Kean employee to task for lacking urgency in responding.

The GRC sees the facts here as slightly distinguishable from Rodriguez. Here, the Custodian ultimately sought nine (9) less business days and was able to provide seventeen (17) pages of records. The extensions arguably appear to approach edge of excessiveness; however, the Custodian's search (conducted with assistance from the Office of the President and Human Resources) was complicated by the wording of the Complainant's OPRA request. The GRC notes that it does appear that the Office of the President and/or Human Resources could have shown more urgency in sending responsive records to the Custodian. However, the GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was not excessive.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

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 Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian certified that the record provided to the complainant was the only record responsive to the request. Id. The Council found that there had thus been no unlawful denial of access. Id. See also Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011)(holding custodian did not unlawfully deny access when he certified that he provided all responsive records to complainant, and there existed no credible evidence in record to refute such certification).

The Complainant filed the instant complaint, contending that the Custodian may not have provided all records that existed. In support of his argument, the Complainant pointed to a NorthJersey.com article, as well as an unattributed comment in the "Comments" section of the Tower. The Complainant asserted that both insinuate that Mr. Blackwell submitted letters of reference to Kean and that those records should have been provided as part of the Custodian's response. In the SOI, the Custodian certified that she provided all records that existed. Further, the Custodian argued that the Complainant's inference from third-party documents did not constitute a denial of access. The Custodian asserted that the Complainant's dissatisfaction with

the absence of additional responsive records was not a basis for a denial and that this complaint should be rendered moot.

Having reviewed all of the evidence of record, the GRC finds that the Custodian provided all records that existed and that no additional records exist. Initially, the Complainant's reliance on the NorthJersey.com article and unattributed comment do not rise to the level of competent, credible evidence that successfully refutes the Custodian's SOI certification. Moreover, there is no other compelling evidence in the record to suggest that Kean maintained any additional records beyond those provided.

Accordingly, the Custodian bore her burden of proving she did not unlawfully deny access to any responsive records because she certified in the SOI, and the record reflects, that she provided all responsive records to the Complainant. N.J.S.A. 47:1A-6; Burns, GRC 2005-68; Kohn, GRC 2009-203 *et seq.* See also Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-184 (January 2015).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request, based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian bore her burden of proving she did not unlawfully deny access to any responsive records because she certified in the SOI, and the record reflects, that she provided all responsive records to the Complainant. N.J.S.A. 47:1A-6; Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011). See also Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-184 (January 2015).

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

November 8, 2017