



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2021 Government Records Council Meeting

Christopher Tirado
Complainant

Complaint No. 2016-165

v.

Rutgers University
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 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 the Council should adopt the ALJ’s findings concluding that “. . . based on the facts presented by the parties in this matter that the original Custodian of Record did not knowingly and willfully violate OPRA.” The ALJ thus “**ORDER[ED]** that the GRC Complaint against Rutgers University is **DISMISSED.**” [Id. at 12.] However, the Council should modify the Initial Decision to find that the Complainant is not a prevailing party and dismiss this complaint accordingly.

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 9th Day of November 2021

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 15, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**Christopher Tirado¹
Complainant**

GRC Complaint No. 2016-165

v.

**Rutgers University²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. E-mails sent by or received from six (6) officials of Rutgers University (“Rutgers”), “UBHC,” and “UCHC” from September 1, 2014 through November 24, 2014 regarding the Complainant.
2. E-mails sent by or received from six (6) officials of Rutgers, “UBHC,” and “UCHC” from May 1, 2013 through October 31, 2013 regarding Sovaldi, Harvoni, and Olysio medication as a cure for Hepatitis C.
3. Current legacy University of Medicine and Dentistry of New Jersey (“UMDNJ”) Ethics documents and “Agreement to Comply,” as well as the current ethics/code of conduct policy for all medical “UBHC/UCHC” employees (including but not limited to doctors, nurses, “APN’s,” and physician assistants).
4. Current UBHC/UCHC organizational chart.

Custodian of Record: Daniel E. Faltas³

Request Received by Custodian: March 20, 2015

Response Made by Custodian: March 27, 2015

GRC Complaint Received: June 13, 2016

Background

June 26, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Council considered the May 15, 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, found that:

¹ No legal representation listed on record.

² Represented by Edward J. Kologi, Esq., of Kologi, Simitz (Linden, NJ).

³ The original Custodian of Record was Elizabeth V. Gilligan. Additionally, OPRA duties for Rutgers were shifted to Casey Woods after the filing of this complaint.

[T]he Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s March 27, 2018 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian’s Counsel failed to establish that the complaint should be reconsidered based on “new evidence.” The Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian’s Counsel did not provide information constituting “new evidence” that warranted reconsideration of the Council’s Order. Thus, the Custodian’s Counsel request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council’s March 27, 2018 Interim Order remains in effect.

Procedural History:

On June 28, 2018, the Council distributed its Interim Order to all parties. On August 31, 2018, this complaint was transmitted to the Office of Administrative Law (“OAL”). On September 23, 2021, the Honorable Edward J. Delanoy, Jr., Administrative Law Judge (“ALJ”) issued an Initial Decision as follows:

I **CONCLUDE** that the mere assertion by [C]omplainant, without any supporting affidavits or evidence, that he is entitled to \$2,542.44 in costs and fees is insufficient to support granting such a claim under N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.13(a). If [C]omplainant can submit documentation of the costs and fees asserted in his brief, including an affidavit of the paralegal who performed the legal services that they were at all times working under the direct supervision of an attorney authorized to work in the State of New Jersey, then [C]omplainant’s claim that he is entitled to reasonable costs and fees may be reconsidered.

Having concluded that based on the facts presented by the parties in this matter that the original Custodian of Record did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances, I hereby **ORDER** that the GRC Complaint against Rutgers University is **DISMISSED**.

[Id. at 12.]

Exceptions:

On October 6, 2021, Custodian’s Counsel filed Exceptions to the ALJ’s Initial Decision. Therein, Counsel took exception to the ALJ’s conclusion that he alleged provided an avenue for the Complainant to petition the GRC for prevailing party attorney’s fees. Counsel argued that the Complainant failed to provide the necessary “documentation” supporting a fee award and should

not be given “another bite at the apple.” Counsel further argued that the ALJ did not provide any authority for this position; thus, the ALJ’s Initial Decision should be modified accordingly.

Extension of Time:

On October 29, 2021, the GRC contacted the OAL seeking an extension of the forty-five (45) business day time frame to adopt, reject, or modify the ALJ’s Initial Decision. On November 1, 2021, the OAL granted said extension through December 22, 2021.

Analysis

Administrative Law Judge’s Initial Decision

The ALJ’s findings of fact are entitled to deference from the Council because they are based upon the ALJ’s determination of the credibility of the parties. “The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

In the instant complaint, the ALJ issued an Initial Decision on September 23, 2021. The ALJ, after fairly summarizing the certifications and evidence, and explaining how he weighed the proofs before him and why he credited, or discredited, certain certified statements, stated:

I CONCLUDE that there has been no evidence introduced which indicates that [the original Custodian] acted with any intentionality or deliberate disregard of OPRA’s statutory commands. As mere negligence is insufficient to constitute a knowing and willful violation of OPRA, and considering the increased number of OPRA requests, [the original Custodian’s] inexperience with the position, and a

reasonable miscommunication between herself and Glick, the more senior records custodian, I **CONCLUDE** that based on the uncontested facts presented by the respondent, [the original Custodian's] conduct—while negligent—was not a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

I **CONCLUDE** that as [C]omplainant has not set forth any specific facts showing that there is a genuine dispute of material fact, and by relying only on unsupported assertions, [the original Custodian's] state of mind regarding her failure to respond to the [C]omplainant's OPRA request remains uncontested and this matter may be decided without a plenary hearing. See [*Zelnick v. Morristown-Beard Sch.*, 445 N.J. Super. 250, 260 (Law Div. 2015); *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 446-47 (2007); *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 540 (1995)]. And so, I **CONCLUDE** that as there is no genuine dispute of material fact, and [the original Custodian's] state of mind did not rise to the level of a knowing and willful violation, the respondent is entitled to summary decision as a matter of law.

[D]etermining whether [C]omplainant was truly a *pro se* litigant is not necessary in order to make a decision on whether he is entitled to compensation for the fees and costs claimed in his brief since, beyond the \$6.24 associated with mailing his June 2018 letter to [the original Custodian] (see Complaint, Ex. C), [C]omplainant has submitted no affidavits, certifications, or other documents in support of his claim for legal fees. The sole documentation of legal fees is a listing of the claimed fees and costs contained within the body of [C]omplainant's brief. See N.J.A.C. 1:1-12.4(a).

Therefore, I **CONCLUDE** that the mere assertion by [C]omplainant, without any supporting affidavits or evidence, that he is entitled to \$2,542.44 in costs and fees is insufficient to support granting such a claim under N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.13(a). If [C]omplainant can submit documentation of the costs and fees asserted in his brief, including an affidavit of the paralegal who performed the legal services that they were at all times working under the direct supervision of an attorney authorized to work in the State of New Jersey, then [C]omplainant's claim that he is entitled to reasonable costs and fees may be reconsidered.

[Id. at 8; 10; 11-12.]

Based on the forgoing analysis, the ALJ “. . . concluded that based on the facts presented by the parties in this matter that the original Custodian of Record did not knowingly and willfully violate OPRA.” The ALJ thus “**ORDER[ED]** that the GRC Complaint against Rutgers University is **DISMISSED.**” [Id. at 12.]

The ALJ's conclusions are clearly aligned and consistent with the evidentiary determinations set forth in his Initial Decision. As such, the GRC is satisfied that it can ascertain which certified statements the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

However, the GRC should accept Custodian Counsel's Exceptions regarding the prevailing party fee issue and modify the Initial Decision accordingly. Specifically, the ALJ notes that it is generally true that *pro se* litigants are not entitled to attorney's fees; this position has been uniformly applied to OPRA's fee shifting provision. See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2005-71 (April 2006). However, the ALJ suggests in his finding that a reconsideration of the fee issue could be available if the Complainant submitted additional documents inclusive of an affidavit that the "paralegal" that assisted him was under the direct supervision of a licensed attorney.

The GRC is persuaded by Custodian Counsel's Exceptions argument: the Complainant had ample opportunity to submit the identified documentation and failed to do so. Further, there is no evidence in the record to indicate that the Complainant obtained and was represented by a licensed attorney at any point during the pendency of this complaint. Further, the Complainant failed to provide any evidence that the "paralegal" that assisted him was supervised by a licensed attorney. In fact, the Complainant notes in an undated letter to the OAL that his "paralegal" was "released due to the Covid pandemic," which strongly suggests that the Complainant was being assisted by another inmate and not a "paralegal" for which prevailing case law has allowed applicable fee recovery. Thus, the record proves definitively that the Complainant is not entitled to an award of prevailing party fees due to his *pro se* status and the Council should modify the Initial Decision to reflect this finding.

Therefore, the Council should adopt the ALJ's findings concluding that ". . . based on the facts presented by the parties in this matter that the original Custodian of Record did not knowingly and willfully violate OPRA." The ALJ thus "**ORDER[ED]** that the GRC Complaint against Rutgers University is **DISMISSED.**" [*Id.* at 12.] However, the Council should modify the Initial Decision to find that the Complainant is not a prevailing party and dismiss this complaint accordingly.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council should adopt the ALJ's findings concluding that ". . . based on the facts presented by the parties in this matter that the original Custodian of Record did not knowingly and willfully violate OPRA." The ALJ thus "**ORDER[ED]** that the GRC Complaint against Rutgers University is **DISMISSED.**" [*Id.* at 12.] However, the Council should modify the Initial Decision to find that the Complainant is not a prevailing party and dismiss this complaint accordingly.

Prepared By: Frank F. Caruso
Executive Director

October 26, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. GRC 13095-18

AGENCY DKT. NO. 2016-165

CHRISTOPHER TIRADO,

Complainant,

v.

RUTGERS UNIVERSITY,

Respondent

Christopher Tirado, complainant, pro se

Edward J. Kologi, Esq., appearing for respondent, Rutgers University (Kologi & Simitz, attorneys)

Record Closed: August 31, 2021

Decided: September 23, 2021

BEFORE **EDWARD J. DELANOY, JR.**, Deputy Director and ALAJ

STATEMENT OF THE CASE

Complainant, Christopher Tirado (complainant), filed a Denial of Access Complaint (the Complaint) against the respondent, Rutgers University (respondent or Rutgers), pursuant to N.J.S.A. 47:1A-1 to -13, the New Jersey Open Public Records Act (OPRA). The Complaint was filed following a delay of 285 business days from the expiration of the

extended deadline without a follow-up response from the respondent. At issue is whether respondent, through its records custodian, knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

PROCEDURAL HISTORY

On June 13, 2016, complainant filed a denial of access complaint with the Government Records Council (GRC). During its meeting on March 27, 2018, the GRC found that the complaint should be referred to the Office of Administrative Law (OAL) for a fact-finding hearing to determine whether there was a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. The GRC transmitted the complaint to the OAL, where it was filed on September 11, 2018, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52: 14F-1 to -13. This matter was originally assigned to the Honorable Dorothy M. Incarvito-Garrabrant, ALJ.

After two attempts at a prehearing conference where the complainant did not attend and some correspondences from both the complainant and respondent, ALJ Incarvito-Garrabrant determined on August 26, 2019, that upon review of the correspondences and the documents transmitted from the GRC that summary decision was appropriate for this matter. Complainant's brief in support of his motion for summary decision was filed November 4, 2019. Respondent's brief in support of its motion for summary decision was filed on November 26, 2019, and the brief in opposition to complainant's motion was filed on December 11, 2019.

Following the transfer of the ALJ Incarvito-Garrabrant to the Superior Court this matter was re-assigned to the undersigned on August 31, 2021.

FACTUAL DISCUSSION

The parties do not contest the facts as set forth in the Findings and Recommendations of the Council Staff (GRC Findings) in its March 27, 2018, meeting. And so, I **FIND** the following as **FACT**:

1. Complainant submitted an OPRA request to the original Custodian of Record, Elizabeth V. Gilligan (original Custodian or Gilligan), on March 10, 2015, which was received by the original Custodian on March 20, 2015. (GRC Findings, at 1.)
2. Complainant requested hard copies of:
 - E-mails sent by or received from six (6) officials of Rutgers University, UBHC, and UCHC from September 1, 2014, through November 24, 2014, regarding the complainant.
 - E-mails sent by or received from six (6) officials of Rutgers University, UBHC, and UCHC from May 1, 2013, through October 31, 2013, regarding Sovaldi, Harvoni, and Olysio medication as a cure for Hepatitis C.
 - Current legacy University of Medicine and Dentistry of New Jersey Ethics documents and “Agreement to Comply,” as well as the current ethics/code of conduct policy for all medical UBHC/UCHC employees (including but not limited to doctors, nurses, APNs, and physician assistants).
 - Current UBHC/UCHC organizational chart.

[ibid.]
3. On March 27, 2015, the fifth business day after receipt of the OPRA request, Gilligan responded in writing seeking an extension until April 24, 2015, to respond to the first and second records. (GRC Findings, at 1-2.)
4. On June 19, 2015, complainant sent a letter to Gilligan seeking an update on his OPRA requests, noting that the extension deadline had passed without a response.¹ (GRC Findings, at 2.)
5. Gilligan did not respond to the complainant’s June letter. Nor did any other custodian of record for Rutgers. (GRC Findings, at 2, 4-5.)

¹ The letter’s certified mail return receipt marks the letter as delivered on June 29, 2015. (Complaint, Ex. C.)

6. On June 13, 2016, the complainant filed a Denial of Access Complaint (the Complaint) with the GRC. (GRC Findings, at 2.)
7. On July 21, 2016, the current Custodian, Daniel E. Faltas, filed a Statement of Information (SOI) certifying that the respondent received the complainant's OPRA request on March 20, 2015; that the original Custodian responded in writing on March 27, 2015, seeking an extension until April 24, 2015; and that the original Custodian was no longer employed by the respondent. Ibid.
8. The current Custodian noted that Rutgers had experienced a 30 percent increase in OPRA requests over the course of 2015 and was working to implement an automated system to streamline its OPRA process. Ibid.
9. The current Custodian affirmed that part of the improvement process entailed reviewing OPRA requests handled by the original Custodian. The current Custodian certified that he was unaware of any other instances where the original Custodian failed to respond as she had in this case. Ibid.
10. The current Custodian attached to the SOI responsive records for the third and fourth OPRA requests. Ibid.
11. On September 2, 2016, the current Custodian responded to the complainant in writing certifying that he was including responsive records for the first and second OPRA requests redacted to remove certain protected information, the redactions were not disputed by the complainant. (GRC Findings, at 3.)
12. The GRC found that the respondent did not bear her burden of proof that she timely responded to the complainant's OPRA request. (GRC Findings, at 5; GRC Interim Order.)

Based on the respondent's papers submitted in support of and in opposition to the motions detailed above, which are uncontested by the complainant, I also **FIND** the following as **FACT**:

Gilligan was employed as a Compliance Associate for Rutgers University in the Office of Enterprise Risk Management from February 2015 until December 2015. Gilligan's duties included, among other things, processing OPRA requests. (Gilligan Cert., ¶ 3.) Gilligan initially worked in this Office with another Records Custodian, Susan Glick, until Glick relocated to Seattle, Washington in August 2015. Ibid.

On or before March 27, 2015, Gilligan and Glick reviewed and discussed complainant's OPRA request. (Gilligan Cert., ¶ 2.) On March 27, 2015, at Glick's instruction, Gilligan wrote a letter to complainant seeking an extension for the first and second items requested. Ibid. (See also Complaint, Ex. B.) Gilligan did not specify the reason for the requested extension in the letter but later certified that it was to allow time to obtain and review the documents. Ibid.

Gilligan noted in her personal log of OPRA requests that she made two notes regarding complainant's request. The first note read: "SG [Susan Glick] emailed request for documents today." Ibid. Gilligan certified that as of November 25, 2019, she believes that the note indicated that Glick had contacted the appropriate Rutgers' offices for the requested records. Ibid. The second note in the log read: "Request for extension letter drafted. Get in touch with Dr. Cevarco by 4/13 if we don't hear earlier." Ibid.

Gilligan certified that the mishandling of complainant's request "may bespeak negligence," but she did not act with any intentionality or with wrongful knowledge when failing to respond or follow-up on complainant's request and that his case simply "fell through the cracks" due to a communication failure between herself and Glick. (Gilligan Cert., ¶¶ 6-8.)

I further **FIND** as **FACT** that the complainant has presented no evidence to establish that the respondent, by and through the original record custodian Elizabeth Gilligan, knowingly and willfully violated OPRA and unreasonably denied access to the requested records and documents.

CONCLUSIONS OF LAW

The Open Public Records Acts (OPRA) reflects a legislative determination that it is the “public policy” of the State that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” N.J.S.A. 47:1A-1; Mason v. City of Hoboken, 196 N.J. 51, 65 (2008). Generally, “a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.” N.J.S.A. 47:1A-5(i). A custodian’s failure to timely respond to a request “shall be deemed a denial of the request.” Ibid. A requestor whose access to a government record is denied by a custodian may file a complaint with the GRC, which has a statutory power to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian.” N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7. If the GRC determines that “the complaint is within its jurisdiction and is neither frivolous nor without factual basis, [it] shall proceed with the adjudication process.” N.J.A.C. 5:105-2.1; N.J.S.A. 47:1A-7(e).

If the GRC “is unable to make a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto,” the GRC may transmit the matter to the OAL for a contested-case hearing. N.J.S.A. 47:1A-7(e); N.J.S.A. 52:14B-1 to -15; N.J.A.C. 5:105-2.7. After a hearing, if it is determined that a custodian “knowingly and willfully violated” OPRA and “is found to have unreasonably denied access under the totality of the circumstances,” the GRC may impose a civil penalty on the custodian. N.J.S.A. 47:1A-7(e); N.J.S.A. 47:1A-11; N.J.A.C. 5:105-2.14.

In addition, OPRA entitles a prevailing requestor to recover reasonable attorney’s fees. N.J.S.A. 47:1A-7(f); N.J.A.C. 5:105-2.13(a). Specifically, such fees “shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the [GRC], access was improperly denied, and the requested records are disclosed pursuant to a determination of the [GRC] or voluntary settlement agreement between the parties.” N.J.A.C. 5:105-2.13(a).

Knowing and Willful

The term “knowing and willful” is not defined in the OPRA regulations but is instead found in our case law. A knowing and willful violation requires the custodian’s actions to be much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); and that the custodian must have had actual knowledge with a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962); Fielder v. Stonak, 141 N.J. 101, 124 (1995)). Evidence of the custodian’s state of mind must show that it was “intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional.” Executive Comm’n on Ethical Standards v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996). Finally, the custodian’s conduct should be examined under the totality of the circumstances, which includes all factors that a reasonably prudent person would consider. N.J.S.A. 47:1A-11(a); Hyman v. Jersey City, 2017 N.J. AGEN LEXIS 899, 90 (Dec. 21, 2017) (citing Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 508 (1997)).

The law is clearly established that there is no presumption of “knowing and willful” misconduct simply from a custodian failing to timely respond to an OPRA request, that there “must be some other element of proof to demonstrate that the official acted in reckless disregard of the statutory command.” Johnson v. Oceanport, GRC 746-08, Initial Decision (Dec. 15, 2008), adopted, Council (Feb. 25, 2009) (citing Executive Comm’n, 295 N.J. Super. at 107) [also available at 2008 N.J. AGEN LEXIS 997, *34-35].

Here, it is uncontested that Gilligan initially timely responded to the complainant’s OPRA request when she wrote seeking an extension until April 24, 2015. Gilligan took no further action to respond to the request, including confirming whether Glick was responding to the complainant’s OPRA request or following up with the necessary departments before the extended deadline passed. When Gilligan resigned from her position some eight months later, she had still not responded to the complainant’s request nor follow-up letter from June 2015. And the respondent did not respond to complainant’s OPRA requests until after he filed the Complaint with the GRC, 285 business days after the extended time frame expired.

While this indicates a not insignificant amount of negligence on the part of Gilligan, as well as the other Rutgers employees who were responsible for responding to OPRA requests, this does not necessarily mean that Gilligan's conduct was a knowing and willful violation of OPRA. See Executive Comm'n, 295 N.J. Super. at 107.

It is also clear from the uncontested facts that Rutgers, and by extension Gilligan, was unprepared to handle the increased numbers of OPRA requests and that the complainant's request was the unfortunate case that fell through the cracks. Gilligan certified that although she initially processed and responded to the complainant's request, based on her requests log and reasonable assumptions as to the delegation of duties, she believed that Glick, the former records custodian, was following up with the appropriate department and responding to the complainant.

Therefore, I **CONCLUDE** that there has been no evidence introduced which indicates that Gilligan acted with any intentionality or deliberate disregard of OPRA's statutory commands. As mere negligence is insufficient to constitute a knowing and willful violation of OPRA, and considering the increased number of OPRA requests, Gilligan's inexperience with the position, and a reasonable miscommunication between herself and Glick, the more senior records custodian, I **CONCLUDE** that based on the uncontested facts presented by the respondent, Gilligan's conduct—while negligent—was not a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Summary Decision

A motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). If a motion for summary decision has been made and supported, to prevail the adverse party must "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The standard governing a motion for summary decision is substantially the same as

a motion for summary judgment under Rule 4:46-2. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995) (citing Frank v. Ivy Club, 228 N.J. Super. 40, 62 (App. Div. 1988)).

In deciding a motion for summary judgment, the court must determine whether the evidence presented, when viewed in the light most favorable to the non-moving party, is “sufficient to permit a rational fact-finder to resolve the alleged disputes in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). As the purpose of summary decisions is to avoid unnecessary hearings and the associated burdens on public resources, a fact-finding hearing should be avoided “when the evidence is so one-sided that one party must prevail as a matter of law.” Ibid. (citing Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986)).

“A party opposing a motion for summary judgment may not rely on unsupported assertions in their pleadings or in their opposition to defeat the motion.” Zelnick v. Morristown-Beard Sch., 445 N.J. Super. 250, 260 (Law Div. 2015) (citing Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999)). See also Friedman v. Martinez, 242 N.J. 450, 472 (2020) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)). The opposing party must come forward with affirmative proof that the facts are not as the movant alleges. Zelnick, 445 N.J. Super. at 260 (internal citations omitted).

Ordinarily when there is a subjective element which requires a determination on the actor’s state of mind—here the custodian’s willfulness—summary judgment should be granted with caution. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1954); Exxon Corp. v. Wagner, 154 N.J. Super. 538, 541 (App. Div. 1977); Haelig v. Seaside Heights Business Improvement District, 2006 N.J. AGEN LEXIS 902, 36-38 (Oct. 31, 2006) (citing Spragg v. Shore Care, 293 N.J. Super. 33, 59 (App. Div. 1996)). However, “subjective intent may not be controlling when the undisputed facts reveal otherwise.” Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 446-47 (2007). See also Brill, 142 N.J. at 541.

Here, complainant has provided no support for his Motion and has made no true assertions in his supporting brief. The Motion is an almost exact word-for-word iteration

of the GRC Findings, except for the inclusion of an unsupported conclusion that the “[r]espondent should be deemed to have knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances,” and the addition of a small section asserting complainant is entitled to costs and paralegal fees. (Complainant’s Brief, at 10.) The only other documents provided by the complainant is a copy of his original Complaint with the certification and exhibits that were attached to same.

Therefore, I **CONCLUDE** that as complainant has not set forth any specific facts showing that there is a genuine dispute of material fact, and by relying only on unsupported assertions, Gilligan’s state of mind regarding her failure to respond to the complainant’s OPRA request remains uncontested and this matter may be decided without a plenary hearing. See Zelnick, 445 N.J. Super. at 260; Liberty Surplus, 189 N.J. at 446-47; Brill, 142 N.J. at 540. And so, I **CONCLUDE** that as there is no genuine dispute of material fact, and Gilligan’s state of mind did not rise to the level of a knowing and willful violation, the respondent is entitled to summary decision as a matter of law.

Costs and Legal Fees

OPRA entitles a prevailing requestor to reasonable attorney’s fees. N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.13(a). Specifically, such fees “shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the [GRC], access was improperly denied, and the requested records are disclosed pursuant to a determination of the [GRC] or voluntary settlement agreement between the parties.” N.J.A.C. 5:105-2.13(a). The GRC has concluded that the delay in responding to complainant was deemed a denial. For purposes of the parties’ Motions, Rutgers does not dispute that complainant is a prevailing party. And so, the only question is whether complainant is entitled to an award of reasonable attorney’s fees.

Complainant asserts that he is entitled to a total of \$2,542.44 in costs and fees. (Complainant’s Brief at 10.) with \$21.44 in OPRA-related costs from mailing his letter by certified mail, return receipt requested to Gilligan in June 2018 (\$6.24) and photocopy

costs at \$0.10 a copy (\$15.20). Ibid. The remaining costs and fees are related to the costs associated with perusing this matter in front of the GRC and the OAL. Ibid. (\$3.50 from complainant mailing his supporting brief and Complaint; and \$2,517.50 in paralegal fees, billed at \$95 an hour.²)

It is generally understood that a pro se litigant is not entitled to attorney's fees since by definition they were acting without the assistance of legal counsel and the costs associated with such assistance. Segal v. Lynch, 211 N.J. 230, 259-60 (2012). Complainant at all times prior to filing his supporting brief represented himself to the presiding ALJ and the respondent as a pro se litigant without any legal counsel or assistance. It was only at the end of his supporting brief that the complainant indicated that he had some legal assistance through an unnamed paralegal. On the other hand, if complainant had legal representation, then the ability to recover paralegal fees would turn on whether the paralegal was receiving adequate supervision by an attorney. See In re Opinion No. 24 of Comm. on the Unauthorized Practice of Law, 128 N.J. 114, 123, 127 (1992).

However, determining whether complainant was truly a pro se litigant is not necessary in order to make a decision on whether he is entitled to compensation for the fees and costs claimed in his brief since, beyond the \$6.24 associated with mailing his June 2018 letter to Gilligan (see Complaint, Ex. C), complainant has submitted no affidavits, certifications, or other documents in support of his claim for legal fees. The sole documentation of legal fees is a listing of the claimed fees and costs contained within the body of complainant's brief. See N.J.A.C. 1:1-12.4(a).

² The paralegal fees were listed as follows:
4.75 hrs. Legal research to prepare initial request.
0.50 hrs. Preparation of initial request.
7.75 hrs. Legal research to prepare GRC Complaint.
0.50 hrs. Preparation of GRC Complaint.
9.25 hrs. Legal research to prepare instant motion.
3.75 hrs. Preparation of instant motion papers.
26.50 hrs. (26.50 hrs. x \$95.00 per hr.)

[Ibid.]

Therefore, I **CONCLUDE** that the mere assertion by complainant, without any supporting affidavits or evidence, that he is entitled to \$2,542.44 in costs and fees is insufficient to support granting such a claim under N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.13(a). If complainant can submit documentation of the costs and fees asserted in his brief, including an affidavit of the paralegal who performed the legal services that they were at all times working under the direct supervision of an attorney authorized to work in the State of New Jersey, then complainant's claim that he is entitled to reasonable costs and fees may be reconsidered.

ORDER


Having concluded that based on the facts presented by the parties in this matter that the original Custodian of Record did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances, I hereby **ORDER** that the GRC Complaint against Rutgers University is **DISMISSED**.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 23, 2021
DATE



EDWARD J. DELANOY, JR.,
Deputy Director & ALAJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mph



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

June 26, 2018 Government Records Council Meeting

Christopher Tirado
Complainant
v.
Rutgers University
Custodian of Record

Complaint No. 2016-165

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s March 27, 2018 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian’s Counsel failed to establish that the complaint should be reconsidered based on “new evidence.” The Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian’s Counsel did not provide information constituting “new evidence” that warranted reconsideration of the Council’s Order. Thus, the Custodian’s Counsel request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council’s March 27, 2018 Interim Order remains in effect.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 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: June 28, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting

Christopher Tirado¹
Complainant

GRC Complaint No. 2016-165

v.

Rutgers University²
Custodial Agency

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. E-mails sent by or received from six (6) officials of Rutgers University (“Rutgers”), “UBHC,” and “UCHC” from September 1, 2014 through November 24, 2014 regarding the Complainant.
2. E-mails sent by or received from six (6) officials of Rutgers, “UBHC,” and “UCHC” from May 1, 2013 through October 31, 2013 regarding Sovaldi, Harvoni, and Olysio medication as a cure for Hepatitis C.
3. Current legacy University of Medicine and Dentistry of New Jersey (“UMDNJ”) Ethics documents and “Agreement to Comply,” as well as the current ethics/code of conduct policy for all medical “UBHC/UCHC” employees (including but not limited to doctors, nurses, “APN’s,” and physician assistants).
4. Current UBHC/UCHC organizational chart.

Custodian of Record: Daniel E. Faltas³
Request Received by Custodian: March 20, 2015
Response Made by Custodian: March 27, 2015
GRC Complaint Received: June 13, 2016

Background

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Council considered the March 20, 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 No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The original Custodian of Record was Elizabeth V. Gilligan. Additionally, OPRA duties for Rutgers were shifted to Casey Woods after the filing of this complaint.

1. The original 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 within the extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order disclosure of responsive records because the current Custodian did so on July 21, and September 2, 2016.
2. The original Custodian violated OPRA by failing to respond within the extended time frame. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The Complainant filed this complaint some over a year after receiving the original Custodian's initial response, and had yet to receive a follow-up response approximately 285 business days after the expiration of the extended time frame. This time period spans the original and current Custodians, which the current evidence of record suggests that both failed to address the Complainant's OPRA request over an egregious period of time. Ultimately, the current Custodian did disclose a number of records after being alerted to the response deficiency through this complaint. Based on the evidence of record, the original Custodian's actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the original Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

Procedural History:

On March 28, 2018, the Council distributed its Interim Order to all parties. On April 11, 2018, the Custodian's Counsel filed a request for reconsideration of the Council's Order based on "new evidence." Therein, Counsel stated that the original Custodian had only been in her position, which included additional job duties, for a month when she received the OPRA request. Counsel asserted that the original Custodian had some prior OPRA experience, but not at an institution as large and complex as Rutgers. Counsel noted that at the time of the OPRA request, the original Custodian was still in the process of receiving training and familiarizing herself with Rutgers' units and offices. Counsel also noted that in her first two (2) months, the original Custodian received approximately half of the 180 OPRA requests received in the first six (6) months of 2015: Rutgers found no other response lapses in any of those requests.

Counsel acknowledged that the forgoing was available to Rutgers at the time that it submitted the Statement of Information ("SOI"), but believed that the Government Records Council ("GRC") should consider the original Custodian's employment status as a mitigating circumstance. Counsel stated that the Complainant was entitled to disclosure in a prompt manner, but it was unfair to attribute intent and willfulness to the original Custodian's actions based on the above.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's Order March 27, 2018 Interim Order on April 11, 2018, nine (9) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

To briefly address the request for reconsideration, “new evidence” as defined for the reconsideration process is that which did not exist prior to a Council decision. Here, Custodian's Counsel stated that the employment status argument was available at the time that Rutgers submitted its SOI. While the arguments advanced by Rutgers are likely more appropriately advanced during the proof hearing, they do not constitute “new evidence” within the confines of reconsideration. The original Custodian's employment status was known at the time of complaint adjudication, and the Custodian did not advance this argument as a mitigating factor in determining an OPRA violation. Based on this, the GRC recommends that the request for reconsideration should be denied.

As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a “palpably

incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian's Counsel failed to establish that the complaint should be reconsidered based on "new evidence." The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Custodian's Counsel did not provide information constituting "new evidence" that warranted reconsideration of the Council's Order. Thus, the Custodian's Counsel request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. Thus, the Council's March 27, 2018 Interim Order remains in effect.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian's Counsel has failed to establish in her request for reconsideration of the Council's March 27, 2018 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian's Counsel failed to establish that the complaint should be reconsidered based on "new evidence." The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian's Counsel did not provide information constituting "new evidence" that warranted reconsideration of the Council's Order. Thus, the Custodian's Counsel request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council's March 27, 2018 Interim Order remains in effect.

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

May 15, 2018⁴

⁴ This complaint was prepared for adjudication at the Council's May 22, 2018 meeting but could not be adjudicated due to lack of a quorum.



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

March 27, 2018 Government Records Council Meeting

Christopher Tirado
Complainant

Complaint No. 2016-165

v.

Rutgers University
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 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 original 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 within the extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order disclosure of responsive records because the current Custodian did so on July 21, and September 2, 2016.
2. The original Custodian violated OPRA by failing to respond within the extended time frame. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The Complainant filed this complaint some over a year after receiving the original Custodian’s initial response, and had yet to receive a follow-up response approximately 285 business days after the expiration of the extended time frame. This time period spans the original and current Custodians, which the current evidence of record suggests that both failed to address the Complainant’s OPRA request over an egregious period of time. Ultimately, the current Custodian did disclose a number of records after being alerted to the response deficiency through this complaint. Based on the evidence of record, the original Custodian’s actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the original Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 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: March 28, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Christopher Tirado¹
Complainant**

GRC Complaint No. 2016-165

v.

**Rutgers University²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. E-mails sent by or received from six (6) officials of Rutgers University (“Rutgers”), “UBHC,” and “UCHC” from September 1, 2014 through November 24, 2014 regarding the Complainant.
2. E-mails sent by or received from six (6) officials of Rutgers, “UBHC,” and “UCHC” from May 1, 2013 through October 31, 2013 regarding Sovaldi, Harvoni, and Olysio medication as a cure for Hepatitis C.
3. Current legacy University of Medicine and Dentistry of New Jersey (“UMDNJ”) Ethics documents and “Agreement to Comply,” as well as the current ethics/code of conduct policy for all medical “UBHC/UCHC” employees (including but not limited to doctors, nurses, “APN’s,” and physician assistants).
4. Current UBHC/UCHC organizational chart.

Custodian of Record: Daniel E. Faltas³

Request Received by Custodian: March 20, 2015

Response Made by Custodian: March 27, 2015

GRC Complaint Received: June 13, 2016

Background⁴

Request and Response:

On March 10, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 27, 2015, the fifth (5th)

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The original Custodian of Record was Elizabeth V. Gilligan. Additionally, OPRA duties for Rutgers were shifted to Casey Woods after the filing of this complaint.

⁴ 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.

business day after receipt of the OPRA request, the original Custodian responded in writing seeking an extension until April 24, 2015 to respond to item Nos. 1 and 2.

On June 19, 2015, the Complainant sent a letter to the original Custodian seeking an update regarding his OPRA request. The Complainant noted that the extension deadline has long since passed without a response.

Denial of Access Complaint:

On June 13, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that original Custodian failed to respond to his OPRA request within the extended time frame to comply. The Complainant contended that this failure to respond resulted in a “deemed” denial. Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). The Complainant requested that the Council set a standard of finding that a custodian failing to respond after 180 business days knowingly and willfully violated OPRA. The Complainant asserted that such a determination would send a clear message to other custodians that they must respond more timely.

The Complainant also contended that his OPRA request item Nos. 1 and 2 were valid because they contained all necessary criteria. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

Statement of Information:

On July 21, 2016, the current Custodian filed a Statement of Information (“SOI”). The current Custodian certified that Rutgers received the Complainant’s OPRA request on March 20, 2015. The current Custodian certified that the original Custodian responded in writing on March 27, 2015 seeking an extension until April 24, 2015.

The current Custodian certified that the original Custodian was no longer employed by Rutgers; thus, he could not determine why she failed to respond within the extended time frame. The current Custodian noted that Rutgers experienced a 30% increase in OPRA requests in the past year and was working to implement an automated system to streamline their OPRA process. The current Custodian affirmed that part of this improvement process entailed reviewing OPRA requests handled by the original Custodian. The current Custodian certified that he was not aware of any instance where the original Custodian failed to respond, as she did here.

The current Custodian certified that he was attaching to the SOI four (4) records responsive to OPRA request item Nos. 3 and 4. The current Custodian also certified that Rutgers was searching its e-mail system for e-mails responsive to item Nos. 1 and 2. The current Custodian certified that he would prepare a detailed response once he had retrieved and reviewed the responsive records. The current Custodian estimated that he believed he would be able to respond by August 30, 2016.

Supplemental Response:

On September 2, 2016, the current Custodian responded to the Complainant in writing. Therein, the current Custodian certified that he was providing access to seven (7) separate files containing records responsive to item Nos. 1 and 2. The current Custodian noted that redactions were made to the e-mails to remove patient names and identification numbers due to privacy concerns. N.J.S.A. 47:1A-1; Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368 (App. Div. 2003). Further, the current Custodian stated that he also redacted “inter-agency, intra-agency advisory, consultative, or deliberative” material from some of the e-mails. N.J.S.A. 47:1A-1.1; Ciesla v. NJ Dep’t of Health & Senior Serv., 429 N.J. Super. 127, 137 (App. Div. 2012). The current Custodian also noted that he was denying access to three (3) e-mail attachments from a particular doctor’s e-mails because they contained medical information about individual patients. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002) and the Health Insurance Portability and Accountability Act of 1996.

Finally, the current Custodian stated that he provided access to records responsive to item Nos. 3 and 4 as part of the SOI. However, the current Custodian noted that he was sending courtesy copies anyway.

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).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, GRC 2007-11.

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and

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.

N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

Here, the original Custodian initially responded on March 27, 2015, the fifth (5th) business day after receipt of the subject OPRA request, obtaining an extension of time until April 24, 2015. However, there is no evidence in the record to indicate that the original Custodian responded prior to the expiration of the extended time frame. Thus, in keeping with Kohn, GRC 2007-124, the original Custodian’s failure to respond prior to the extension expiration resulted in a “deemed” denial.

Accordingly, the original 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 within the extended time frame 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, GRC 2007-11. See also Kohn, GRC 2007-124. However, the GRC declines to order disclosure of responsive records because the current Custodian did so on July 21, and September 2, 2016.⁶

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,

⁶ The Complainant did not contact the GRC following the current Custodian’s response to dispute the redactions or denial of the attachments. Thus, the GRC does not address these denials.

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 matter before the Council, the original Custodian initially responded in a timely manner obtaining an extension of time. However, the original Custodian subsequently failed to respond any further. It was not until the filing of this complaint over a year after the expiration of the time frame that the current Custodian disclosed multiple records. Such a delay in response, absent any evidence in the record that the original Custodian endeavored to respond before leaving Rutgers, may rise to the level of a knowing and willful violation.

Accordingly, the original Custodian violated OPRA by failing to respond within the extended time frame. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The Complainant filed this complaint some over a year after receiving the original Custodian's initial response, and had yet to receive a follow-up response approximately 285 business days after the expiration of the extended time frame. This time period spans the original and current Custodians, which the current evidence of record suggests that both failed to address the Complainant's OPRA request over an egregious period of time. Ultimately, the current Custodian did disclose a number of records after being alerted to the response deficiency through this complaint. Based on the evidence of record, the original Custodian's actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the original Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The original 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 within the extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order disclosure of responsive records because the current Custodian did so on July 21, and September 2, 2016.
2. The original Custodian violated OPRA by failing to respond within the extended time frame. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The Complainant filed this complaint some over a year after receiving the original Custodian's initial response, and had yet to receive a follow-up response approximately 285 business days after the expiration of the extended time frame. This time period spans the original and current Custodians, which the current evidence of record suggests that both failed to address the Complainant's OPRA request over an egregious period of time. Ultimately, the current

Custodian did disclose a number of records after being alerted to the response deficiency through this complaint. Based on the evidence of record, the original Custodian's actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the original Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

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