



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

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**December 18, 2018 Government Records Council Meeting**

Luis F. Rodriguez  
Complainant

Complaint No. 2016-264

v.

Kean University  
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 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, finds that 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; Ciccarone v. N.J. Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). 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).

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 18<sup>th</sup> Day of December, 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: December 20, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
December 18, 2018 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-264**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “I request a copy of the memorandum signed [sic] on August 28, 2005 and mentioned on page 2 of the contract attached. The memorandum was between Kean University, the Wenzhou Municipal People’s Government, and the NZFC-Sino American Association.”

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** August 29, 2016  
**Response Made by Custodian:** September 8, 2016  
**GRC Complaint Received:** September 22, 2016

**Background<sup>3</sup>**

**Request and Response:**

On August 27, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 8, 2016, the Custodian responded in writing, advising the Complainant that an extension of time to until September 22, 2016 was necessary to process the OPRA request appropriately.

**Denial of Access Complaint:**

On September 22, 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. The Complainant also contended that the Custodian failed to attempt to reach a reasonable accommodation.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Jennifer L. Cavin.

<sup>3</sup> 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Supplemental Response:

On September 22, 2016, the Custodian responded in writing, advising the Complainant that an extension of time to until October 6, 2016 was necessary to process the OPRA request appropriately. On September 26, 2016, the Custodian responded in writing providing the Complainant with the requested memo.

Statement of Information:

On September 30, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 29, 2016. The Custodian certified that she forwarded the Complainant’s OPRA request to the Office of Record, and determined that the contract referenced by the Complainant was a record that was provided in response to an older OPRA request. The Custodian certified that the contract was forwarded to the Office of Record to aid in searching for the requested memo. The Custodian certified that to facilitate the search, an extension letter was sent to the requestor via e-mail on September 8, 2016.

The Custodian affirmed that representatives contacted for the request that is subject to this matter were unable to locate the requested memo. The Custodian certified that the request was forwarded to another office with possible knowledge of the memo on September 21, 2016. The Custodian affirmed that she subsequently sought an additional extension on September 22, 2016. The Custodian certified that the responsive memo was located on September 23, 2016, and after review for responsiveness and redactions, disclosed to the Complainant via e-mail on September 26, 2016.

The Custodian initially contended that because the records were disclosed to the Complainant, the complaint was now moot and should be dismissed. See Mason v. City of Hoboken, Docket No. A-0508-06T5, 2008 N.J. Super. Unpub. LEXIS 1660, \*7 (App. Div. Jan. 29, 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request). The Custodian also asserted that the matter was not ripe for adjudication as it was filed prior to the expiration of the extended deadline. See Werner v. N.J. Civil Service Comm’s, GRC Complaint No. 2011-151 (explaining that in order for a complaint to be ripe, a complainant must have been denied access to a government record).

The Custodian also contended that, even if the matter was ripe for adjudication, her extensions were reasonable. N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div.), certif. denied, 190 N.J. 394 (2007). The Custodian noted that factors considered when assessing the reasonableness of extensions include whether or not the record is stored or archived, or “if a request for access would to a government record would substantially disrupt agency operations.” N.J.S.A. 47:1A-5(i). The Custodian also quoted: “[t]here is an obvious connection between the specificity of the request and custodian’s ability to provide a prompt reply.” N.J. Builders Ass’n, 390 N.J. Super. at 178. The Custodian argued that in the current matter, the Complainant sought a record that was eleven (11) years old and referenced from a separate document. The Custodian contended that she had to ascertain what the Complainant was seeking and then proceed to locate the record. The Custodian also stated that she kept the Complainant apprised of the status of his request. 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 Transp., GRC Complaint Nos. 2007-315 through 317 (February 2009).

## 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).<sup>4</sup> 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, GRC 2009-317 (May 2011), the custodian responded in writing to the complainant’s request on the fourth (4<sup>th</sup>) 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 GRC 2007-315, *et seq.*], the Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) 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, GRC 2010-68, the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the Complainant’s OPRA request and

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<sup>4</sup> 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.

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, GRC 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not unquestioningly find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. 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 two (2) extensions as follows:

| <b>Date of Request for Extension</b> | <b>New Deadline for Response</b> | <b>Reason for Extension</b>                                |
|--------------------------------------|----------------------------------|--|
| September 8, 2016                    | September 22, 2016               | So that the OPRA request may “be appropriately processed.” |
| September 22, 2016                   | October 6, 2016                  | So that the OPRA request may “be appropriately processed.” |

The Complainant’s OPRA request sought a memo dated from 2005 that was referenced in a contract the Complainant obtained in a prior OPRA request. The Custodian extended the response time on two (2) occasions before responding on September 26, 2016, disclosing the memo without redactions. Those extensions amounted to fourteen (14) business days.<sup>5</sup> 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.<sup>6</sup>

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

<sup>5</sup> 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.

<sup>6</sup> 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.

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.<sup>7</sup>

Regarding the request, the Custodian argued in the SOI that she needed the extensions because the requested record was eleven (11) years old, and referenced from a separate record. A review of the request on its face does support that a level of complexity existed in terms of identify the record. Further, the evidence of record indicates that the Custodian worked with two (2) offices to locate the record, and disclosed records on September 26, 2016, just two (2) business days after extending the deadline a second time.

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 distinguishable from Rodriguez. Here, the Custodian ultimately sought considerably fewer business days to extend the deadline and was able to provide the records without redactions. The GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was not excessive due to the nature of the requested record.

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; Ciccarone, GRC 2013-280. 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).

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that 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; Ciccarone v. N.J. Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). 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).

Prepared By: Samuel A. Rosado  
Staff Attorney

December 11, 2018

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<sup>7</sup> "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*.