



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

March 28, 2017 Government Records Council Meeting

Luis F. Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2016-269

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 18, 2016, and there is nothing in the evidence of record disputing sufficiency of the disclosure.
2. The Custodian failed to respond immediately to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 18, 2016. Further, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



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

Final Decision Rendered by the
Government Records Council
On The 28th Day of March, 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: March 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2016-269

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the monthly activity statements for the Kean University credit cards used by Dawood Farahi, Alyce Franklin-Owens, and Phil Connelly for the period from August 2015 to the date of request.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: August 29, 2016
Response Made by Custodian: September 8, 2016
GRC Complaint Received: October 11, 2016

Background³

Request and Response:

On August 28, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records, and the Custodian stated that she received the Complainant’s request on August 29, 2016. On September 8, 2016, the seventh (7th) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that an extension of time would be required until September 22, 2016, in order to process the request appropriately. By letter dated September 22, 2016, the Custodian sought another extension of time until October 6, 2016, in order to process the request appropriately. By letter dated October 6, 2016, the Custodian sought a third extension of time until October 20, 2016, in order to process the request.

Denial of Access Complaint:

On October 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Custodian responded

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer L. Cavin.

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.

to his OPRA request by stating that she needed an extension of time until September 22, 2016. The Complainant further asserts that on September 22, 2016, the Custodian notified him that she was taking another fourteen day extension of time. The Complainant states that the Custodian took the extensions of time without consulting him and that the Custodian failed to provide any explanation for taking the extensions. The Complainant further states that the requested records were invoices, and as such they should have been disclosed immediately.

Additional Submissions

By letter dated October 18, 2016, the Custodian informed the Complainant that 74 pages of records were determined to be responsive to the request. The Custodian further informed the Complainant that said records were being disclosed in redacted form via e-mail.

Statement of Information:

On October 20, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on August 29, 2016. The Custodian further certifies that she responded to the Complainant in writing on September 8, 2016, seeking an extension of time until September 22, 2016. The Custodian also certifies that she notified the Complainant on September 22, 2016, and October 6, 2016, that she would need additional extensions of time. The Custodian certifies that she sought the extensions of time to identify and compile responsive records and that after confirming she was in possession of all responsive records, the records had to be redacted pursuant to N.J.S.A. 47:1A-1.1.⁴ The Custodian certifies that she provided 74 pages of responsive records in redacted form to the Complainant on October 18, 2016.

The Custodian’s Counsel first argues that the Complainant has not been unlawfully denied access to the requested records because the Custodian provided the records to the Complainant on October 18, 2016. The Custodian’s Counsel next argues that the matter was not ripe at the time the Complainant filed the complaint. Counsel states that the Custodian properly requested extensions of time from September 8, 2016, to September 22, 2016, from September 22, 2016, to October 6, 2016, and from October 6, 2016, to October 20, 2016. Counsel argues that the Complainant, instead of waiting until October 20, 2016, filed the complaint on October 10, 2016. As such, the Custodian’s Counsel contends, the matter was not ripe at the time the Complainant filed the complaint. Counsel cites to Werner v. Civil Service Comm’n, GRC Complaint No. 2011-151 (December 2012) as holding that in order for a complaint to be ripe, a complainant must have been denied access to a government record. The Custodian’s Counsel contends that there was no denial of access and asks the GRC to find that the Custodian complied with OPRA.

⁴ The GRC notes that, although the Custodian informed the Complainant that the requested records were redacted and subsequently confirmed in Item 10 and Item 12 of the SOI that redactions were made to the records, the Custodian certified in Item 9 of the SOI that the records were provided to the Complainant in their entirety without redactions.

Additional Submissions

The Complainant submitted two e-mails dated October 20, 2016, in reply to the Custodian's SOI. In the first e-mail, the Complainant states that the Custodian and Counsel should be "ashamed of [themselves] for being inefficient beyond belief!" The Complainant states that in dispositions of his complaints with similar fact patterns, the Council has ruled that Kean violated OPRA; therefore, to argue otherwise in the instant complaint is a waste of taxpayer money. In the second e-mail, the Complainant states that "[r]ipeness in [Werner, GRC 2011-151] does not mean the same as the way in which [the Custodian's Counsel] used it"

Analysis

Timeliness

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

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

Here, the Complainant requested monthly statements reflecting the usage of Kean University credit cards by certain employees. The Complainant argued that the requested records were invoices, and therefore they should have been provided immediately.⁷ Generally, invoices

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

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

⁷ The Complainant's statement reflects the fact that the Council has consistently held that invoices are analogous to bills and are therefore immediate access records pursuant to N.J.S.A. 47:1A-5(e). See Rivera v. City of Newark

are the individual sales transactions that comprise a statement of a customer's account activity, whereas a statement is the status of the account at a particular point in time.⁸ As such, statements *per se* would not constitute an immediate access record under N.J.S.A. 47:1A-5(e). However, in Rodriguez v. Kean University, GRC Complaint No. 2015-298 (January 2017), the Council determined that *credit card statements* are immediate access records. The Council concluded that “[s]uch statements are easily identifiable as ‘bills,’ which categorically are considered records subject to ‘immediate access.’ N.J.S.A. 47:1A-5(e).”

As immediate access records, the Custodian had an obligation to respond immediately to the Complainant, either granting access, denying access, seeking clarification, or requesting an extension of time. The evidence of record reveals, however, that the Custodian did not initially respond to the Complainant's request seeking an extension of time to respond until September 8, 2016, which was the seventh (7th) business day following receipt of the request. Further, the GRC is not satisfied that actions such as identification and compilation of the requested records constituted extenuating circumstances that would prevent the Custodian from immediately responding to the request seeking an extension of time.

Therefore, the 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 immediately, results in a “deemed” denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98 and Harris, GRC 2011-65. See also Herron, GRC 2006-178. However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 18, 2016, and there is nothing in the evidence of record disputing sufficiency of the disclosure.

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

(Essex), GRC Complaint No. 2010-274 (April 2012); Rankin v. Township of Delaware (Hudson), GRC Complaint No. 2011-82 (May 2012).

⁸ “An invoice received from a supplier shows the items purchased, the cost per unit, the total cost or extension of each item, and the total of all the items listed on the invoice. A statement from a supplier lists all of the amounts owed on past invoices as of a specified date.” See Accounting Coach® (<http://www.accountingcoach.com>).

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

Here, the Custodian failed to respond immediately to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately provided all responsive records on October 18, 2016. Further, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

1. The 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). *See* Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). *See also* Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). However, the GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on October 18, 2016, and there is nothing in the evidence of record disputing sufficiency of the disclosure.
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Prepared By: John E. Stewart

March 21, 2016