



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 18, 2018 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2016-272

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 OPR 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). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-128 (November 2017). 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 18th 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. Rodriguez¹
Complainant**

GRC Complaint No. 2016-272

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “I request any document in which Kean itemized the expenditures it incurred with regards to Wenzhou Kean University from January 2015 to the present.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: August 29, 2016

Response Made by Custodian: September 8, 2016; September 22, 2016; October 6, 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. 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. On September 22, 2016, the Custodian extended the time frame again to until October 6, 2016. On October 6, 2016, the Custodian extended the deadline for a third time to until October 20, 2016.

Denial of Access Complaint:

On October 11, 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

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

accommodation.

Supplemental Response

On October 20, 2016, the Custodian responded in writing, advising that an extension until November 3, 2016, was necessary to process the OPRA request appropriately. On November 3, 2016, the Custodian responded in writing, advising that an extension until November 17, 2016, was necessary to process the OPRA request appropriately.

On November 7, 2016, the Custodian responded in writing to the Complainant's request, disclosing nine (9) pages of responsive records.

Statement of Information:

On November 18, 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 the President, but due to personnel changes, the office stated it needed additional time to locate responsive records. The Custodian certified that to facilitate the search, an extension letter was sent to the Complainant via e-mail on September 8, 2016.

The Custodian then certified that while the Office of Human Resources ("HR") was searching for responsive records, additional extension letters were sent to the Complainant on September 22, 2016 through November 3, 2016. The Custodian certified that on November 7, 2016, she received nine (9) pages of responsive records from HR. After review for potential redactions, the Custodian certified that she provided the records to the Complainant that same day.

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 contended that at the time of the Denial of Access Complaint filing, her response was not due until October 20, 2016. The Custodian this argued that because she had not yet denied access to the Complainant's OPRA request, this complaint was not ripe for adjudication and should be dismissed accordingly.

The Custodian also contended that, even if the complaint was ripe for adjudication, she was within her right to seek extensions. The Custodian then contended that 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 asserted that the extensions were necessary to allow personnel time to locate and review identified records that were unfamiliar to them. Additionally, the Custodian asserted that the Office of Record had gone through personnel changes and the request itself covered documents spanning over a year. The Custodian also stated that she kept the Complainant apprised of the status of the request throughout the process. The Custodian further contended that she properly responded within each extended time frame, providing an anticipated date on which she would respond. 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).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Rivera, GRC 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not agree to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in [Starkey GRC 2007-315, *et seq.*], the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be

⁴ A custodian's written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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 (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner, 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 multiple extensions as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
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.”
October 6, 2016	October 20, 2016	So that the OPRA request may “be appropriately processed.”
October 20, 2016	November 3, 2016	So that the OPRA request may “be appropriately processed.”
November 3, 2016	November 17, 2016	So that the OPRA request may “be appropriately processed.”

The Custodian extended the response time on five (5) occasions before responding on November 7, 2016, disclosing nine (9) pages of records without redactions. Those extensions

amounted to forty-one (41) business days.⁵ As noted above, a requestor's approval is not required for a valid extension.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to respond to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁶

Regarding the request, the Complainant sought "any document" which contained itemized expenditures Kean incurred regarding a Chinese-based university over a twenty-one (21) month period. The Custodian argued in the SOI that the extensions were necessary because the request sought records spanning over a year, and that a personnel change within the Office of Record hindered the Custodian's ability to effectively locate responsive records.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decisions in Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017) and Rodriguez v. Kean Univ., GRC Complaint No. 2016-128 (November 2017) for a comparison. In Rodriguez, GRC 2015-312, 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. In Rodriguez, GRC 2016-128, the Council found the facts to be distinguishable from Rodriguez, 2015-312. There, the Council found that the custodian detailed the process taken to locate and respond to the subject request. Additionally, the Council agreed with the custodian's claim that the request's complexity necessitated the extensions.

The GRC sees the facts here as more on point with Rodriguez, GRC 2016-128. Here, the Custodian sought eleven (11) more business days and provided fewer pages of records. The extensions arguably appear to be excessive; however, the Custodian's search was complicated by the personnel changes that occurred at the Office of Record and articulated the process conducted to locate responsive records. Thus, 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. See also Rodriguez, GRC 2016-128. 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).

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

⁶ "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*.

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). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-128 (November 2017). 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