



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

**PHILIP D. MURPHY**  
*Governor*

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

**FINAL DECISION**

**November 13, 2018 Government Records Council Meeting**

Luis F. Rodriguez  
Complainant

Complaint No. 2016-296

v.

Kean University  
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 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:

1. The Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant’s September 29, 2016 OPRA request not seeking “immediate access” records, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian’s unnecessary extensions resulted in a “deemed denial” of the remainder of the Complainant’s OPRA request. Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017). However, the Custodian did ultimately respond within the last extended time frame denying the OPRA request as invalid. Further, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian 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 13<sup>th</sup> Day of November, 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: November 15, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
November 13, 2018 Council Meeting**

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

**GRC Complaint No. 2016-296**

v.

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

**Records Relevant to Complaint:** Electronic copies of all correspondence between Kean University (“Kean”) and Dobco, Inc. (“Dobco”) (Wayne, NJ) regarding the construction contract for the North Avenue Academic Building between February 1, 2016 and present.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** September 29, 2016  
**Response Made by Custodian:** October 10, 2016  
**GRC Complaint Received:** November 16, 2016

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

**Request and Response:**

On September 29, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 10, 2016, the Custodian responded in writing, advising that an extension until October 24, 2016, was necessary to process the OPRA request appropriately. On October 24, 2016, the Custodian responded in writing, advising that an extension until November 7, 2016, was necessary to process the OPRA request appropriately. On November 7, 2016, the Custodian responded in writing, advising that an extension until November 21, 2016, was necessary to process the OPRA request appropriately.

**Denial of Access Complaint:**

On November 16, 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

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

<sup>2</sup> Represented by Deputy Attorney General Eric L. Apar.

<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.

Complainant argued that the Custodian failed to identify a legitimate reason for the extensions. Additionally, the Complainant asserted that the Custodian failed to provide a definitive date on which she would disclose the responsive records. The Complainant also contended that the Custodian failed to attempt to reach a reasonable accommodation.

Supplemental Response:

On November 21, 2016, the Custodian responded in writing denying the Complainant's request as invalid. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005).

Statement of Information:

On December 20, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on September 29, 2016. The Custodian certified that she sought multiple extensions before denying access to the request on November 21, 2016 as invalid.

The Custodian affirmed that the subject OPRA request was a revised version of a request the Complainant submitted in April 2016. The Custodian stated that after denying access to that request as invalid, the Complainant filed a complaint in New Jersey Superior Court. The Custodian averred that the court dismissed the complaint in August 2016, holding that Kean lawfully denied the request as invalid. The Custodian averred that the related litigation resulted in extensive legal review to determine whether the subject OPRA request was valid. The Custodian averred that, to this end, she had multiple meetings with the Office of Records, where it was determined that this request was invalid.

Initially, the Custodian argued that this complaint was unripe for adjudication. The Custodian stated that a complaint was only ripe where a requestor alleges an unlawful denial of access. See N.J.S.A. 47:1A-7(b); Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012). The Custodian contended that at the time of the Denial of Access Complaint filing, her response was not due until November 21, 2016. The Custodian thus 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 next contended that, even if it were ripe for adjudication at the time of filing, she was within her right to seek extensions. Further, the Custodian next contended that her extensions were reasonable. N.J. Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian contended that Kean needed the additional time due to the prior litigation resulting in legal review of the request. The Custodian further argued that the subject request was vague, especially given the extensive project involving multiple employees of both Kean and Dobco, as well as the resulting voluminous files. 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).

Finally, the Custodian further contended that because the Complainant only argued the extension issue, the GRC need not address the actual denial of access. However, the Custodian argued that it was nonetheless lawful. The Custodian contended that the Complainant’s OPRA request failed to identify specific senders/recipients. See Lagerkvist v. Office of the Governor of N.J., 443 N.J. Super. 230 (App. Div. 2015). The Custodian averred that the North Avenue project was extensive and resulted in thousands of communications between Kean and Dobco. The Custodian thus contended that the Complainant’s request resembled an open-ended search of Kean’s files. The Custodian also contended that Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) supported her response that the request was invalid. The Custodian noted that the Complainant, apparently in recognition of the invalid nature of his request, submitted a new OPRA request on December 17, 2016 to include specific individuals.

#### Additional Submissions:

On December 20, 2016, the Complainant e-mailed the GRC questioning how it took the Custodian such an extensive amount of time to determine that the request was overbroad.

### 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, 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 consent 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

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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.

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 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, 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 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 three (3) extensions for the Complainant’s OPRA request as follows:

<b>Date of Request for Extension</b>	<b>New Deadline for Response</b>	<b>Reason for Extension</b>
October 10, 2016	October 24, 2016	So that the OPRA request may “be appropriately processed.”
October 24, 2016	November 7, 2016	So that the OPRA request may “be appropriately processed.”
November 7, 2016	November 21, 2016	So that the OPRA request may “be appropriately processed.”

The Complainant's OPRA request sought all correspondence between Kean and Dobco, regarding the construction contract for the North Avenue Academic Building between February 1, 2016 and the request date. The Custodian extended the response time on three (3) occasions before responding on November 21, 2016, stating that the request was invalid. Those extensions amounted to thirty (30) 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 did not object to the Custodian's extensions of time prior to filing this complaint.<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 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 Complainant sought correspondence for an eight (8) month period between Kean and Dobco regarding a specific project. The Custodian argued in the SOI that the extensions were necessary because prior litigation with the Complainant over a similar request recently occurred. The Custodian certified in the SOI that she had multiple meetings which resulted in a finding that the request was invalid. A review of the request indicates that the Custodian would be required to perform an e-mail search, as well as search for hardcopy letters, memoranda, *etc.* to locate responsive records. The Custodian argued that any search here would have been difficult given the number of potential communications with Dobco regarding multiple projects. However, it appears that no such search took place because Kean ultimately determined that the request was invalid.

From the Custodian's receipt of the Complainant's OPRA request, she initially sought ten (10) business days to respond. The Custodian then sought an additional two (2) extensions of twenty (20) business days. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of one (1) full month of business days.

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. 2016-196 (February 2018) 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 2016-196, the Council found the facts to be distinguishable from Rodriguez, GRC 2015-312. In reaching this conclusion, the Council reasoned that the request there required a more significant search. The

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<sup>5</sup> The time period is notwithstanding any closures or holidays that might have occurred during the time frame.

<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.

<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*.

Council also found that the Custodian's early response coming four (4) days before the end of the extended time frame as compelling evidence that the extension was reasonable.

The GRC sees the facts here as more on point with Rodriguez, GRC 2015-312. Specifically, while the Custodian ultimately sought nine (9) fewer business days than in GRC 2015-312, the length of time needed to reach a conclusion that the request was invalid is excessive. The GRC also joins the Complainant in questioning the length of time it took to determine that the request was invalid. This complaint departs from Rodriguez, GRC 2016-196 in that there, the extensions were reasonable based on the search necessary to confirm the non-existence of records. Here, the Custodian determined the request was invalid and there is no evidence in the record to indicate that any such search was conducted. Thus, based on the evidence of record, the GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was excessive and contrary to OPRA's mandate to "promptly comply" with a records request and to grant or deny access "as soon as possible . . ." N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The GRC finds it unreasonable for Kean to take a month to determine that a request was invalid, regardless of its connection to prior litigation.<sup>8</sup>

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's September 29, 2016 OPRA request not seeking "immediate access" records, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

### **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,

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<sup>8</sup> The GRC does not address Custodian's denial of access based on the validity of the subject OPRA request because the issue was not raised by the Complainant at any point during the pendency of this complaint.



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's unnecessary extensions resulted in a "deemed denial" of the remainder of the Complainant's OPRA request. Rodriguez, GRC 2015-312. However, the Custodian did ultimately respond within the last extended time frame denying the OPRA request as invalid. Further, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian 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**

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's September 29, 2016 OPRA request not seeking "immediate access" records, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian's unnecessary extensions resulted in a "deemed denial" of the remainder of the Complainant's OPRA request. Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017). However, the Custodian did ultimately respond within the last extended time frame denying the OPRA request as invalid. Further, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian 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.

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

November 7, 2018