



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2016-309

v.

Kean University
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 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). 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 31st Day of July, 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: August 3, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2016-309

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of correspondence between Ting Xu (also known as Alan Xu) and Dawood Farahi, James McGreevey, Rich Bagger, Phil Connelly, You Wang, Maofa (also known as Paul) Huang, and/or any member of the Kean University (“Kean”) Board of Trustees (“Board”) between November 2015 and present.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: September 26, 2016
Response Made by Custodian: October 5, 2016
GRC Complaint Received: December 9, 2016

Background³

Request and Response:

On September 26, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 27, 2016, the Complainant sent a follow-up e-mail to the Custodian including the subject or content of the correspondence: Wenzhou Kean, the Green Lane conference center table, and/or any Kean business ventures in China.

On October 5, 2016, the Custodian responded in writing, advising that an extension until October 19, 2016, was necessary to process the OPRA request appropriately. On October 18, 2016, the Custodian responded in writing, advising that an extension until November 2, 2016, was necessary to process the OPRA request appropriately. On November 2, 2016, the Custodian responded in writing, advising that an extension until November 16, 2016, was necessary to process the OPRA request appropriately. On November 16, 2016, the Custodian responded in writing, advising that an extension until November 30, 2016, was necessary to process the OPRA

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer 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.

request appropriately. On November 30, 2016, the Custodian responded in writing, advising that an extension until December 14, 2016, was necessary to process the OPRA request appropriately.

Denial of Access Complaint:

On December 9, 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. 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 December 14, 2016, the Custodian responded in writing, advising that an extension until January 4, 2017, was necessary to process the OPRA request appropriately. The Custodian noted that this extension was also necessary due to Kean’s upcoming holiday closure. On January 4, 2017, the Custodian responded in writing, advising that an extension until January 11, 2017, was necessary to process the OPRA request appropriately. On January 11, 2017, the Custodian responded in writing, advising that an extension until January 12, 2017, was necessary to process the OPRA request appropriately. On January 12, 2017, the Custodian responded in writing, advising that an extension until January 18, 2017, was necessary to process the OPRA request appropriately. On January 18, 2017, the Custodian responded in writing, advising that an extension until January 20, 2017, was necessary to process the OPRA request appropriately.

On January 20, 2017, the Custodian responded in writing to the Complainant’s OPRA request. The Custodian stated that she was disclosing 454 pages of records with redactions of “inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material,” information that would give an advantage to bidders and competitors, personnel/pension information, and privacy interest. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.S.A. 47:1A-10. The Custodian also noted that no correspondence between Mr. Xu and You Wang, Mr. McGreevey, or any member of the Board existed for the referenced time period.

Statement of Information:

On January 20, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 26, 2016. The Custodian noted that she received the Complainant’s clarification on September 27, 2016. The Custodian affirmed that she sought multiple extensions over the next four (4) months to accommodate the request, before ultimately producing 454 pages of records with redactions on January 20, 2017.

The Custodian certified that her search for responsive records entailed sending the OPRA request to senior management for review on September 30, 2016. The Custodian affirmed that the Office of Human Resources (“HR”) worked closely with management to review the request. The

Custodian also noted that a number of the individuals identified in the OPRA request either were not employees, were no longer employed, or were subject to recent personnel changes. The Custodian affirmed that this extensive review by all individuals necessitated extensions through November 30, 2016. The Custodian certified that in December 2016, she received confirmation of those records that did not exist. The Custodian certified that in order to perform a more thorough search, Kean had to utilize the Office of Computer and Information Services (“OCIS”). The Custodian noted that one of the individuals identified in the request was reassigned to an international assignment, which further necessitated the need for OCIS to perform a search. The Custodian affirmed that after forwarding the request to OCIS, the Custodian sought another extension until December 14, 2016.

The Custodian certified that Kean was closed for holiday break from December 24, 2016 through January 3, 2017. The Custodian affirmed that upon her return, she sent another extension letter because no new information was available. The Custodian noted that OCIS was conducting an extensive review of Kean’s servers in the midst of a campus wide system conversion and upgrade. The Custodian certified that she sent another extension letter on January 11, 2017 because OCIS had not completed its final search. The Custodian affirmed that she received OCIS’s results on January 12, 2017, which comprised of 550 pages of potentially responsive records. The Custodian certified that each page had to be printed, reviewed for responsiveness, and redacted where applicable. The Custodian certified that this process, which featured a diligent review, printing problems, and a Federal holiday, necessitated the additional extensions. The Custodian certified that she was able to provide 454 pages of redacted records⁴ to the Complainant on January 20, 2017.

The Custodian also 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 contends that Kean needed the additional time due to the voluminous nature of the request, which involved a number of individuals spanning a year. The Custodian further argued that she had to rely on assistance from OCIS, and needed time to review for responsiveness and redact over 550 pages of records. 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).

The Custodian contended that this complaint is moot because she properly responded to the OPRA request in writing with valid extension requests and ultimately provided all responsive records to the Complainant on January 20, 2017. Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660 (App. Div. 2008) at 7. The Custodian further argued that this complaint was not ripe for adjudication because of on-going extension requests. Werner v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012) (holding that the complaint was not ripe for adjudication because the custodian had not yet denied access to any records).

⁴ The Complainant did not submit any additional arguments regarding the redactions.

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera, GRC 2009-317, 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 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 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 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, 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, GRC 2013-280, 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 for the Complainant’s November 30, 2015 OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
October 5, 2016	October 19, 2016	So that the OPRA request may “be appropriately processed.”
October 18, 2016	November 2, 2016	So that the OPRA request may “be appropriately processed”
November 2, 2016	November 16, 2016	So that the OPRA request may “be appropriately processed.”
November 16, 2016	November 30, 2016	So that the OPRA request may “be appropriately processed.”
November 30, 2016	December 14, 2016	So that the OPRA request may “be appropriately processed.”
December 14, 2016	January 4, 2017	So that the OPRA request may “be appropriately processed” and due to the pending holiday break.
January 4, 2017	January 11, 2017	So that the OPRA request may “be appropriately processed.”
January 11, 2017	January 12, 2017	So that the OPRA request may “be appropriately processed.”
January 12, 2017	January 18, 2017	So that the OPRA request may “be appropriately processed.”
January 18, 2017	January 20, 2017	So that the Custodian can review records for responsiveness and redactions

The Custodian extended the response time on ten (10) occasions for a total of approximately sixty-eight (68) business days, accounting for public holidays and closures. The GRC notes that the final four (4) extensions comprised of twelve (12) of those business days. As noted above, a requestor’s approval is not required for a valid extension. However, 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. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the

request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁵ Id.

Regarding the request, the Complainant sought "correspondence" between Ting Xu and six (6) individuals, as well as the entire Board, spanning approximately eleven (11) months. In the SOI, the Custodian went into explicit detail as to the challenges of finding responsive records. Some of those challenges included that individuals were either not employed by Kean, no longer employed, or had changed positions. The Custodian further provided a detailed account of Kean's reliance on the OCIS to ensure all responsive records were located. The Custodian also affirmed that OCIS was performing a campus wide system conversion and upgrade during the search process. Exacerbating the length time was the loss of seven (7) business days due to a holiday break. Once the Custodian received the approximately 550 pages of potentially responsive records on January 12, 2017, it only took her six (6) business days to review and ultimately disclose 454 pages with redactions.

From the Custodian's receipt of the Complainant's OPRA request, she initially sought ten (10) business days to respond. The Custodian then sought nine (9) additional extensions comprising fifty-eight (58) business days. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of over two (2) full months of business days. However, it should be reiterated that the final four (4) extensions only spanned twelve (12) total business days.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2016-128 (November 2017), although decided during the pendency of this complaint, for instruction. There, the Council found that the Custodian's thirty (30) business day extension to provide seventeen (17) pages of responsive records was reasonable because of the Custodian's complications with the wording and interpretation of the OPRA request. Furthermore, the Custodian made note of the assistance she sought and received from other employees in order to fulfill the request.

Here, the OPRA request was not complicated in wording, but obviously produced voluminous pages of records numbering 550. However, similar to the facts in Rodriguez, the Custodian here certified to the involved search necessary to ensure that all responsive records were located. Further, the Custodian here ultimately provided roughly twenty-six (26) times the page amount of records, with redactions, than in Rodriguez in a little more than double the time frame. Therefore, the GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was not excessive.

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 "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: Frank F. Caruso
Communications Specialist/Resource Manager

July 24, 2018