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*Governor*

LT. GOVERNOR SHEILA Y. OLIVER  
*Commissioner*

**FINAL DECISION**

**April 24, 2018 Government Records Council Meeting**

Luis Rodriguez  
Complainant

Complaint No. 2016-87

v.

Kean University  
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 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 February 1, 2016 OPRA request. N.J.S.A. 47:1A-6. The Custodian’s extensions of time to respond to the Complainant’s request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone v. NJ Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); and Rodriguez v. Kean Univ., 2015-77 (September 2017).

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 24<sup>th</sup> Day of April, 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



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
April 24, 2018 Council Meeting**

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

**GRC Complaint No. 2016-87**

v.

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

**Records Relevant to Complaint:**

“I request a copy of all the Public Access Files [“PAF”] which Kean currently must have available for public inspection. This website has information on the PAF and on employers’ responsibilities. <http://www.immigrationdc.com/blog/public-access-file-requirement-for-h-1b-employers/>. Please send me a copy of whichever type of document (invoices or checks) which is easier to retrieve.

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** February 1, 2016

**Response Made by Custodian:** February 9, 2016; February 23, 2016; March 8, 2016; March 22, 2016

**GRC Complaint Received:** March 24, 2016

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

**Request and Response:**

On January 29, 2016, the Complainant submitted an (2) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 9, 2016, the Custodian responded in writing, seeking an extension of time to respond to the Complainant’s requests to until February 23, 2016. The Custodian then sought additional extensions of time on February 23, 2016, March 8, 2016, and March 22, 2016.

**Denial of Access Complaint:**

On March 24, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that since filing his initial requests, the Custodian has repeatedly extended the time to respond, without sufficient

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

<sup>2</sup> Represented by Jennifer McGruther, DAG.

<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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

explanation. Moreover, the Complainant argued that the Custodian neither consulted with him nor sought his permission when announcing the extensions. Additionally, the Complainant stated that the Custodian did not set a firm date to respond to his request, but rather extended the time to respond by fourteen (14) days. See N.J.S.A. 47:1A-5(g).

Lastly, the Complainant argued that the last line of his request referencing the form of document requested was not pertinent to his request and should not have been the cause of the delay in providing the records in a timely manner.

Statement of Information:

On April 27, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 1, 2016. That same day, the request was forwarded to the Office of Human Resources (“HR”). The Custodian certified that 10 PAFs were located by HR and identified as current based upon their approval and expiration dates. The Custodian stated that some of the files reference former Kean University (“Kean”) employees, and therefore needed to be retrieved and further reviewed. The Custodian certified that she sent extension letters to the Complainant on February 9, 2016, through March 8, 2016, to allow for enough time to identify, retrieve, and review the files.

The Custodian certified that on March 15, 2016 she was provided with all responsive PAFs for copying. Thereafter, the Custodian sent a final extension letter to the Complainant on March 22, 2016 to allow time to copy, redact, and scan the responsive records. The Custodian certified that on April 5, 2016, a disposition letter and 437 pages of responsive records were e-mailed to the Complainant. The Custodian wished to note that processing this request was complicated by the Complainant’s active Notice of No Contact and No Trespass<sup>4</sup>, asserting that PAFs are normally made available to requestors via on-site inspection. See 20 CFR 655.760(a).

The Custodian initially argued that since the Complainant has the requested records, the matter is not 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).

Regarding the request, the Custodian discerned the meaning of the request based on a previous request from the Complainant, where he sought PAFs of the “labor conditions applications” submitted by Kean for an H1-B visa. Unlike the current request, the previous request specifically identified the positions sought. The Custodian certified that federal law requires that an employer “make a filed labor condition application and necessary supporting documentation available for public examination at the employer’s place of business . . .” 20 CFR 655.760(c). Therefore, the Custodian stated that these records may exist for not only H-1B employees, but also for positions that were previously held by such employees or never held by them.

The Custodian argued that because the Complainant did not specify the positions in his request for all PAFs, the Custodian had to identify what positions generated a labor condition application, resulting in locating ten (10) PAFs. Thereafter, the Custodian stated that she needed

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<sup>4</sup> See infra, pg. 3.

to ensure that the files did not reveal personal or personnel information when produced to the Complainant.

The Custodian argued that extensions of time to respond to OPRA requests are appropriate under certain circumstances, stating they “reflect the Legislature’s intention to balance the requestor’s interest in prompt access to identifiable records and the operational needs of government.” 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.

In the instant matter, the Custodian argued that since the OPRA request did not identify the specific employee positions as did previous requests, the Custodian had to identify which positions required the use of PAFs prior to reviewing and ultimately producing the records to the Complainant.

In addition to the arguments set forth under Item 12, the Custodian certified as to the number of OPRA requests received by the Complainant in a 3½ year span. The Custodian certified that in that period she has received 369 OPRA requests from the Complainant and described them generally as being multi-part and complex. In addition to the OPRA requests, the Custodian certified that she was also handling fifty-two (52) Denial of Access Complaints filed by the Complainant during that period. The Custodian also claimed that the Complainant frequently sends follow-up e-mails that further complicate processing his requests and lengthens the time to respond.

The Custodian noted that since his termination from Kean, he was issued a “Notice of No Contact and No Trespass – Kean University” as a result of his conduct towards Kean employees, to where he is only allowed to submit OPRA requests and communicate with Kean’s Associate Vice President and Chief University Counsel.

#### Additional Submissions

On April 27, 2016, the Complainant responded to the Custodian’s SOI submission, disputing the Custodian’s statements pertaining to his history of OPRA requests with Kean. The Complainant argued that such statements were irrelevant to the matter at issue. Additionally, the Complainant claimed that on February 23, 2016, he requested to view the responsive records on campus, but was denied by Kean’s Counsel.

On May 18, 2016, the Complainant sent another letter to the GRC disputing the Custodian’s account contained in her SOI. The Complainant alleged that another person contacted Kean requesting access to PAFs and was told to come to Kean in a week’s time to view the records. The Complainant contended that if Kean allegedly told this person that it would take a week to

prepare the records, then why did it take them more than two (2) months for his OPRA request for the same or similar records?

## Analysis

### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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 provide respond by that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 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 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 v. NJ Dep’t of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), 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 v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), 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 v. NJ Civil Serv. Comm’n, GRC Complaint No. 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 find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep’t of Treas., 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.” See also Rodriguez v. Kean Univ., 2015-77 (September 2017).

In the instant matter, the Custodian sought multiple extensions for the Complainant’s February 1, 2016 OPRA request as follows:

<b>Date of Request for Extension</b>	<b>New Deadline for Response</b>	<b>Reason for Extension</b>
February 9, 2016	February 23, 2016	So that the OPRA request may “be appropriately processed.”
February 23, 2016	March 8, 2016	So that the OPRA request may “be appropriately processed.”
March 8, 2016	March 22, 2016	So that the OPRA request may “be appropriately processed.”
March 22, 2016	April 5, 2016	So that the OPRA request may “be appropriately processed.”

The subject OPRA request sought any “Public Access Files” available for inspection. The Custodian extended the response time on four (4) occasions for approximately 44 business days, accounting for public holidays. 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.<sup>5</sup> Id.

<sup>5</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*.

In the instant matter, the Custodian issued her first extension on February 9, 2016, the second-to-last day of the initial seven (7) business day deadline. However, the Custodian certified that the records were forwarded to the appropriate parties on February 1, 2016, the date of receipt. The Custodian also argued because the OPRA request did not specify names, titles, or dates, the time taken to identify and retrieve the records was extended. Once the responsive records were located, the Custodian argued that it took approximately three (3) weeks to review, redact, copy, and scan the records, totaling 437 pages of records.

Although the Custodian did not need permission from the Complainant to extend the time for response, the burden remains with the Custodian to justify the reasons for multiple extensions. That burden increases when the extension of time is measured in months rather than days. However, the Custodian has met her burden in this case. Although the extensions were numerous, they are a fraction compared to the nineteen extensions made in Rodriguez, GRC 2015-77. The Custodian's SOI adequately explains why fulfilling the request necessitated the extensions. Additionally, the Custodian's request of three (3) weeks to review at least 437 pages of employee-related records for redactions, coping, and scanning was reasonable considering the lack of specificity in the request, and the potential redactions necessary when reviewing personnel records.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's February 1, 2016 OPRA request. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone, GRC 2013-280; and Rodriguez, GRC 2015-77.

### **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 February 1, 2016 OPRA request. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone v. NJ Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); and Rodriguez v. Kean Univ., 2015-77 (September 2017).

Prepared By: Samuel A. Rosado  
Staff Attorney

April 17, 2018