



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

April 25, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2016-88

v.

Kean University
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 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 portions of the Complainant’s January 20, 2016 OPRA requests 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 remainder 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 Complainant’s two (2) OPRA requests. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian responded on April 27, 2016, by providing nine (9) pages of responsive records to the Complainant. Further, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were 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 25th Day of April, 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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-88

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of:

1. Any document in which Kean University (“Kean”) itemized the expenditures it incurred with regard to Wenzhou Kean University (“Wenzhou”) in 2013 (based on a document entitled “Wenzhou China Expenditures April -12” (“Expenditures”) report provided in response to a prior OPRA request).
2. Any document in which Kean itemized the expenditures it incurred with regard to Wenzhou in 2014 (based on the “Expenditures” report).

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: January 20, 2016
Response Made by Custodian: January 29, 2016
GRC Complaint Received: March 24, 2016

Background³

Request and Response:

On January 20, 2016, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. The Complainant included a screenshot of the “Expenditures” report for reference. On January 29, 2016, the Custodian responded in writing, advising the Complainant that an extension of time until February 12, 2016, would be necessary to process the OPRA requests appropriately. On February 12, 2016, the Custodian responded in writing, advising that an extension until February 26, 2016, would be necessary to process the OPRA requests appropriately. On February 26, 2016, the Custodian responded in writing, advising that an extension until March 11, 2016, would be necessary to process the OPRA requests appropriately. On March 11, 2016, the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

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.

Custodian responded in writing, advising that an extension until March 24, 2016, would be necessary to process the OPRA requests appropriately.

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 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.

Additional Submissions:

On March 24, 2016, the Custodian responded in writing, advising that an extension until April 7, 2016, would be necessary to process the OPRA requests appropriately. On April 7, 2016, the Custodian responded in writing, advising that an extension until April 21, 2016, would be necessary to process the OPRA requests appropriately. On April 21, 2016, the Custodian responded in writing, advising that an extension until April 27, 2016, would be necessary to process the OPRA requests appropriately.

On April 27, 2016, the Custodian responded to the Complainant in writing by disclosing nine (9) pages of responsive records.

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 requests on January 20, 2016. The Custodian alleged that the Complainant sent an e-mail to her on January 25, 2016, noting that the type of documents referenced in the contract between Kean and Wenzhou were the records to which he sought access.⁴ The Custodian certified that she forwarded the request to the Office of the President on January 21, 2016. The Custodian certified that the Office of the President determined that the “Expenditures” report was part of an old reconciliation process that Wenzhou had since changed. The Custodian certified that she had sought the first (1st) extension to allow her office time to determine whether any responsive records existed within the newly established process. The Custodian affirmed that she sought the remaining extensions to continue to facilitate this process. The Custodian certified that she engaged in multiple e-mail exchanges and telephone calls to facilitate a response. The Custodian certified that she received nine (9) pages of responsive records from the Office of Human Services on April 27, 2016. The Custodian certified that she responded to the Complainant on the same day by electronically providing those records.

⁴ Neither the Custodian nor the Complainant provided to the GRC a copy of the e-mail as part of their submissions.

The Custodian initially argued that she had no obligation to fulfill the Complainant's OPRA requests seeking "documents" because they failed to identify specific government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, 12-13 (App. Div. 2008). The Custodian contended that this complaint should be dismissed because of the invalid nature of the Complainant's OPRA requests. The Custodian asserted that, notwithstanding this, she endeavored to locate responsive records similar to the "Expenditures" report. The Custodian asserted that no identical records existed; thus, she identified alternate records supplying the information sought. The Custodian asserted that the process of identifying these records involved multiple Kean units and agents. The Custodian contended that she extended the time frame on multiple occasions to identify those alternate records, collect them, review them, and disclose them to the Complainant.

The Custodian contended that even if the subject OPRA requests were valid, OPRA allows for extensions under appropriate circumstances. N.J.S.A. 47:1A-5(i); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 178 (App. Div. 2007)("[t]here is an obvious connection between the specificity of the request and a custodian's ability to provide a prompt reply"). The Custodian argued that the Complainant's invalid request required substantial effort to fulfill. The Custodian contended that she continually updated the Complainant on the status of his OPRA requests and provided access to them upon receipt from the Office of Human Services. The Custodian contended that, based on the foregoing, she did not unlawfully deny access to any records and did not knowingly and willfully violate OPRA.

Of note, the Custodian also provided a supplemental certification regarding Kean's history with the Complainant. Specifically, the Custodian certified that she had received 369 OPRA requests from the Complainant between November 2012 and the date of the instant SOI. The Custodian averred that the Complainant submitted 143 OPRA requests in 2015 (66% of all OPRA requests Kean received in that period) and 32 OPRA requests in 2016 (currently 58% of OPRA requests Kean had received to date). The Custodian affirmed that the Complainant's OPRA requests are multi-part and require extensive coordination within Kean to locate records that, in some instances, span several years. The Custodian certified that the Complainant often sends follow-up and clarifying e-mails in tandem with requests, which increases the time needed to respond. The Custodian noted that, by way of example, the Complainant had submitted eleven (11) OPRA requests in that most recent seven (7) business day period and four (4) follow-up e-mails with corrections and/or clarifications. The Custodian also certified that the Complainant has filed 52 Denial of Access Complaints and an Order to Show Cause from February 2013 until the date of the instant SOI. The Custodian noted that the uptick in the Complainant's OPRA requests coincides with his termination in April 2013.

The Custodian certified that the Complainant's conduct led Kean to issue a "Notice of no Contact and No Trespass" that prohibits the Complainant from contacting Kean University employees but still allows him to submit OPRA requests and send communications to selected Kean officials. The Custodian explained that the Complainant subsequently violated that notice, which resulted in a criminal charge. According to the Custodian, the Complainant pleaded guilty to a "disorderly conduct/rough behavior" charge and paid \$328.00 in fines and court costs.

Additional Submissions:

On May 17, 2016, the Complainant e-mailed the GRC, requesting that it “consider sanctions” against the Office of the President for taking over three (3) calendar months to provide the responsive records. The Complainant contended that such a delay was “much too long.”

Analysis

Timeliness

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 (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 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 (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 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 (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 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. In rendering the decision, the Council cited as legal authority 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 Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009).

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. NJ 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 for the Complainant’s OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
January 29, 2016	February 12, 2016	So that the OPRA request may “be appropriately processed.”
February 12, 2016	February 26, 2016	So that the OPRA request may “be appropriately processed.”
February 26, 2016	March 11, 2016	So that the OPRA request may “be appropriately processed.”
March 11, 2016	March 24, 2016	So that the OPRA request may “be appropriately processed.”
March 24, 2016	April 7, 2016	So that the OPRA request may “be appropriately processed.”
April 7, 2016	April 21, 2016	So that the OPRA request may “be appropriately processed.”
April 21, 2016	April 27, 2016	So that the OPRA request may “be appropriately processed.”

The Complainant’s two (2) OPRA requests sought “documents” showing Wenzhou’s expenditures similar to the “Expenditures” report for 2013 and 2014. The Custodian extended the response time on seven (7) occasions before responding on April 27, 2016, disclosing nine (9) pages of records. Those extensions amounted to sixty-three (63) business days⁵. As noted above, a requestor’s approval is not required for a valid extension. However, the GRC notes that the

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.

record here is unclear whether or not the Complainant agreed to the extensions prior to filing the instant complaint: neither party included correspondence indicating that the Complainant either disputed the extensions or agreed.⁶

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.⁷

The evidence of record indicates that the Custodian worked with at least the Office of the President and Human Services to respond to the subject OPRA requests. Ultimately, the Custodian contended in the SOI that Kean's new process did not produce records like the "Expenditure" reports; thus, she needed extra time to explore alternatives to satisfy the OPRA request. Notwithstanding this, the records she disclosed on April 27, 2016, looked exactly like the "Expenditures" report screenshot included in the subject OPRA requests. This fact begs the question of whether such significant time truly was necessary to produce the responsive records.⁸

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 six (6) extensions of fifty-three (53) business days while she attempted to locate and provide the responsive records. Thus, the Custodian sought, in addition to the original seven (7) business days, almost two (2) full months of business days for the subject OPRA requests. These extensions, given that she only produced nine (9) pages of records very similar to the "Expenditures" report screenshot, indicates that the Custodian could have provided these records well before her disclosure on the same day she submitted the SOI in this case to the GRC. Thus, the record does not sufficiently prove any particularly harmful extenuating circumstances that would have warranted such an extensive delay.

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 clearly excessive and flies in the face of 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 more than a month to provide nine (9) pages of records that appear substantially similar to the screenshot included in the Complainant's two (2) OPRA requests.

⁶ 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.

⁷ "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*.

⁸ Even if a request is invalid on its face, prevailing case law provides that a custodian cannot rely on the overly broad defense if the Custodian was able to locate responsive records. See Burke v. Brandes, 429 N.J. Super. 69 (App. Div. 2012); Verry v. Borough of Sout Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012).

The GRC is also not persuaded that the Custodian needed almost two (2) months of business days to determine whether records existed.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's January 20, 2016 OPRA requests 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 remainder 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, 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 Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian responded on April 27, 2016, by providing nine (9) pages of responsive records to the Complainant. Further, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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

The Executive Director 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 January 20, 2016 OPRA requests 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 remainder 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 Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian responded on April 27, 2016, by providing nine (9) pages of responsive records to the Complainant. Further, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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.

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

April 18, 2017