



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2017-128

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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 April 28, 2017 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 to the totality of the circumstances. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See also Ciccarone v. N.J. Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); Werner v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012); Rodriguez v. Kean Univ., GRC Complaint No. 2016-157 (May 2018).

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 30th Day of July 2019

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 2, 2019

=STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

**Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2017-128

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “A copy of all correspondence (including but not limited to letters, emails, faxes, and/or texts) between the Union Township Court’s office, the Union Township Clerk’s Office, the Union Township Police Department and the Kean University Police Department, the Kean University Office of Public Safetu [sic]/Police and/or the Kean University Counsel’s Office related to the subject of Mr. Proetta’s correspondence with Union Township (the summons issued to Mr. Rodriguez and/or Mr. Proetta’s discovery letters). I seek all such correspondence between February 20, 2014 to the present.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: April 28, 2017

Response Made by Custodian: May 9, 2017; May 23, 2017

GRC Complaint Received: June 5, 2017

Background³

Request and Response:

On April 28, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 9, 2017, the Custodian responded in writing, advising the Complainant that an extension until May 23, 2017 was necessary to process the OPRA request appropriately. On May 23, 2017, the Custodian responded in writing, advising that an extension until June 6, 2017 was necessary to process the OPRA request appropriately.

Denial of Access Complaint:

On June 5, 2017, the Complainant filed a Denial of Access Complaint with the Government

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Eric Apar.

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.

Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by continuously extending the period to respond to his OPRA request. The Complainant argued that the Custodian did not identify any mitigating circumstances, nor did she attempt to reach a reasonable accommodation with the Complainant. The Complainant also asserted that the Custodian did not set a firm date by which she anticipated responding to the request, but instead extend the response by fourteen (14) days.

Supplemental Response

On June 6, 2017, the Deputy Custodian Meghan Lenahan (“Deputy Custodian”) responded in writing on behalf of the Custodian, advising that an additional extension until June 20, 2017 was necessary to process the OPRA request. On June 20, 2017, the Custodian responded in writing, providing thirteen (13) pages of records containing redactions. The Custodian stated that the redactions were made pursuant to OPRA’s privacy interest exemption. N.J.S.A. 47:1A-1.

Statement of Information:

On June 29, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 28, 2017. The Custodian certified that because the request sought documents related to an active legal proceeding, it was forwarded to the Office of University Counsel (“OUC”) for review. The Custodian certified that when it was confirmed that the OUC did not have responsive records, the request was forwarded to the Department of Campus Police (“DCP”) on May 3, 2017. The Custodian certified that responsive records were received by the Office of Human Resources on May 4, 2017, but upon review there was concern that the response was incomplete. The Custodian certified that an extension letter was forwarded to the Complainant on May 9, 2017, extending the time to respond to until May 23, 2017.

The Custodian then certified that while she was on a business trip, the Deputy Custodian continued to fulfill the OPRA request. The Custodian certified that while she was away, the Deputy Custodian sent an additional extension letter on June 6, 2017.

The Custodian certified that she returned to her office on June 12, 2017, and upon confirming that the provided records were complete and that all necessary redactions were made, she delivered the records to the Complainant on June 20, 2017 via e-mail.

The Custodian first argued that this complaint was moot because the Complainant received the responsive records on May 31, 2017. Stop & Shop Supermarket, Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286 (App. Div. 2017); Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660 (App. Div. 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request). The Custodian noted that the courts have held that they “will not decide cases in which . . . a judgement cannot grant effective relief.” Cinque v. N.J. Dep’t of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993). See also N.J. Div. of Youth & Family Serv. v. W.F., 434 N.J. Super. 288, 297 (App. Div. 2014).

The Custodian 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. 2007). The Custodian contended that Kean University (“Kean”) needed the additional time to consult with multiple offices because the request was wide in scope, spanning several years and several entities. 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. N.J. 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, 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).”

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.

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 v. N.J. 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. N.J. 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.”

In the instant matter, the Custodian sought multiple extensions for the Complainant’s April 28, 2017 OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
May 9, 2017	May 23, 2017	So that the OPRA request may “be appropriately processed.”
May 23, 2017	June 6, 2017	So that the OPRA request may “be appropriately processed.”
June 6, 2017	June 20, 2017	So that the OPRA request may “be appropriately processed.”

The Custodian extended the response time on three (3) occasions for a total of approximately twenty-nine (29) business days, accounting for public holidays. As noted above, a requestor’s approval is not required for a valid extension. However, it should be noted that the Complainant did not object to any extension prior to filing this complaint.

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.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2016-157 (May 2018) for comparison. In that case, the Council held that the Complainant's request for correspondence between several individuals over a two (2) year period justified a twenty-six (26) business day extension. The Council held that the extensions were not unduly excessive based on the totality of the circumstances.

Here, the Complainant's request sought correspondence pertaining to litigation-related communications over a three (3) year period. The Custodian argued in the SOI that the extensions were necessary because the request involved five (5) different public entities and a far-reaching scope of time. Compared to the request in Rodriguez, GRC 2016-157 the scope of this request was more expansive. Additionally, the Custodian described the efforts to consult with each relevant agency to locate responsive records and ensure the response's completeness.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's April 28, 2017 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 to the totality of the circumstances. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See also Ciccarone, GRC 2013-280; Werner, GRC 2011-151; Rodriguez, GRC 2016-157.

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 April 28, 2017 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 to the totality of the circumstances. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See also Ciccarone v. N.J. Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012); Rodriguez v. Kean Univ., GRC Complaint No. 2016-157 (May 2018).

Prepared By: Samuel A. Rosado
Staff Attorney

July 23, 2019

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*.