



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 12, 2019 Government Records Council Meeting

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

Complaint No. 2017-241

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 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:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request within the given extension period which ended November 21, 2017. 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 in this case a reasonably necessary extension thereof, resulted 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (January 2010). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (October 2007). However the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on January 3, 2018.
2. The Custodian failed to respond to the Complainant’s OPRA request prior to the last day of an extension, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g) N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on January 3, 2018. Further, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was 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 12th Day of November 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: November 15, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2017-241

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “. . . the following reports listed as appendices to the [p]eriodic [r]eview [r]eport Kean recently submitted to the Middle States Commission on Higher Education:” (“MSCHE”):

1. Appendix 4.13 Three-year Enrollment Projections
2. Appendix 4.14 S&P Global Report: Kean University (01-11-2017)
3. Appendix 4.15 Moody’s Report: Kean University (06-09-2-15)

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: October 12, 2017
Response Made by Custodian: October 23, 2017
GRC Complaint Received: December 20, 2017

Background³

Request and Response:

On October 12, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On October 23, 2017, the Custodian responded in writing, advising that an extension until November 6, 2017, was necessary to process the OPRA request appropriately. On November 6, 2017, the Custodian responded in writing, advising that an extension until November 21, 2017, was necessary to process the OPRA request appropriately. On November 22, 2017, the first (1st) business day after the prior extension expired, the Custodian responded in writing, advising that an extension until December 6, 2017, was necessary to process the OPRA request appropriately.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther, Esq.

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.

On December 6, 2017, the Custodian responded in writing, advising that an extension until December 20, 2017, was necessary to process the OPRA request appropriately. On December 20, 2017, the Custodian responded in writing, advising that an extension until January 10, 2018, was necessary to process the OPRA request appropriately. The Custodian noted that this extension was also necessary due to Kean University's ("Kean") upcoming holiday closure.

Denial of Access Complaint:

On December 20, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that since he submitted the request on October 21, 2017, "the Custodian has continued to take extensions in responding to [his] request." The Complainant asserted that the Custodian violated OPRA by not providing the requested records in a timely manner. Further, the Complainant averred that the Custodian did not "identify any mitigating circumstances" as the reason for the extensions, nor did she offer a date certain that she would respond to his request.

Supplemental Response:

On January 3, 2018, the Custodian responded in writing providing a link to Kean's webpage containing the records responsive to the Complainant's request.

Statement of Information:

On January 22, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 12, 2017. The Custodian asserted that she responded with notices of extension on October 23, 2017, November 6, 2017, November 22, 2017, December 7, 2017, and December 20, 2017. The Custodian affirmed that she responded in writing on January 3, 2018 directing the Complainant to access responsive records on Kean's website.

The Custodian asserted that on October 9, 2017 she received a separate OPRA request "on a related subject matter" that she processed in conjunction with the subject of this complaint. The Custodian averred that she forwarded both requests to the "Office of Record" but received no response. The Custodian further averred that she sent an initial extension letter to the Complainant on October 23, 2017.

The Custodian asserted that said office endured personnel changes resulting in another extension letter dated November 6, 2017. In that letter, the Custodian extended the response date to Complainant's OPRA request until November 21, 2017. The Custodian asserted that the requested record was not considered final until Kean received a letter from the MSCHE. The Custodian noted that Kean had not received said letter. Thus, the Custodian issued another extension letter on November 22, 2017 for response by December 6, 2017.

In addition, the Custodian alleged that on November 30, 2017, the Office of Record provided a link to the Kean website that did not serve purpose to answer the request. The Custodian

averred that she then issued an extension on December 6, 2017 for response by December 20, 2017.

Finally, the Custodian asserted that she extended the timeframe a final time on December 20, 2017 because a corrected link was not yet available. The Custodian certified that on January 3, 2018, she replied to the Complainant providing a working link to Kean's webpage containing the requested records.

The Custodian contended that multiple extensions were reasonable here. N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian asserted that she worked diligently to obtain a record that Kean had not yet publicized. The Custodian averred that the process of obtaining the records was slowed by circumstances beyond her control. The Custodian further contended that the complaint should be dismissed because the Complainant received the requested records.

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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

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.

[Id.]

In the matter before the Council, the Custodian sought an extension of time to respond to the Complainant's OPRA request through November 21, 2017. However, the Custodian did not respond again until November 22, 2017. In the SOI, the Custodian certified to these facts. Based on the forgoing and the Council's decision in Kohn, GRC 2007-124, the Custodian's failure to respond prior to the expiration of the extended time frame resulted in a "deemed" denial.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. However the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on January 3, 2018.

Finally, the GRC notes it does not address whether the extensions in their totality were reasonable and substantiated because the Complainant's OPRA request was "deemed" denied at the expiration of the second extension of time.

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); 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 failed to respond timely to the Complainant's OPRA request prior to the last day of an extension, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on January 3, 2018. Further, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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 Complainant's OPRA request within the given extension period which ended November 21, 2017. 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 in this case a reasonably necessary extension thereof, resulted 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (January 2010). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (October 2007). However the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on January 3, 2018.
2. The Custodian failed to respond to the Complainant's OPRA request prior to the last day of an extension, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g) N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on January 3, 2018. Further, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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: Brandon Garcia
Case Manager

October 30, 2019