



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 21, 2019 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2017-82

v.
Kean University
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 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 April 3, 2017 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). However, the Council declines to order disclosure as the evidence in the record demonstrates that the Custodian provided responsive records on May 11, 2017.
2. The Custodian’s failure to respond to the April 3, 2017 OPRA request immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately responded to the request by producing responsive records that had not been previously provided. 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 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 21st Day of May 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: May 22, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2017-82

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of “invoices and requisitions related to the following checks issued to Rich Loalbo [(“Mr. Loalbo”)]:

1377973 08/31/11 Reconciled 0045880 Richard M. Loalbo 10,796.00
1409950 07/03/12 Reconciled 0862535 Richard M. Loalbo, Lc 24,000.00
1409950 07/03/12 Reconciled 0862535 Richard M. Loalbo, Llc 24,000.00
1436779 05/08/13 Reconciled 0862535 Richard M. Loalbo, Llc 12,699.00
1462938 03/12/14 Reconciled 0862535 Richard M. Loalbo, Llc 23,230.00
1473810 09/17/14 Reconciled 0862535 Richard M. Loalbo, Llc 3,900.00”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: April 3, 2017

Response Made by Custodian: April 12, 2017

GRC Complaint Received: April 17, 2017

Background³

Request and Response:

On April 1, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 12, 2017, the Custodian responded in writing, advising the Complainant that an extension of time to respond to the request to until the end of business on April 26, 2017, pursuant to N.J.S.A. 47:1A-5(i).

Denial of Access Complaint:

On April 17, 2017 the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kerry Soranno.

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.

Government Records Council (“GRC”). The Complainant asserted that the Custodian improperly extended the time to respond. The Complainant also asserted that “invoices and requisitions” are Kean University (“Kean”) terms for vouchers, and therefore are considered immediate access records. Additionally, the Complainant contended that the Custodian failed to provide an explanation for the extension and thus violated OPRA.

Supplemental Response

On April 26, 2017, the Custodian responded in writing, advising that an additional extension to until May 10, 2017 was necessary to process the OPRA request. On May 10, 2017, the Custodian extended the time frame again to until May 12, 2017.

On May 11, 2017, the Custodian responded in writing to the Complainant’s request, noting that records responsive to the request were previously provided through dispositions dated August 28, 2014, December 5, 2014, and February 23, 2017. The Custodian also stated that two (2) additional responsive records were located and copies were attached to the e-mail.

Statement of Information:

On May 17, 2017, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on April 3, 2017. The Custodian certified that the Complainant had submitted several previous requests seeking records related to Mr. Loalbo and was provided with such records. The Custodian certified that the process of responding to the request involved determining whether all responsive invoices were already in the Complainant’s possession. The Custodian asserted that research was done to identify each payment corresponding to the checks listed in the request. The Custodian contended that the extension requests were made to facilitate the time needed for said research. The Custodian asserted that it was determined that the Complainant had previously received all but two (2) responsive invoices.

The Custodian certified that the first invoice was received on April 27, 2017. The Custodian certified that on May 2, 2017, the second invoice was received after inquiring as to its status that same day. The Custodian then certified that after a review for accuracy and to ensure that all responsive records were accounted for, a disposition letter was sent to the Complainant on May 11, 2017.

The Custodian initially contended that because the records were disclosed to the Complainant, the complaint was now 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). The Custodian also asserted that the matter was not ripe for adjudication as it was filed prior to the expiration of the extended deadline. See Werner v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-151 (explaining that in order for a complaint to be ripe, a complainant must have been denied access to a government record).

The Custodian also contended that she was within her rights to seek extensions of time to respond. 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 argued that the Complainant needed additional time because the requested invoices dated back to 2011. The Custodian contended that research was needed to connect each check to their respective invoice(s) and then discern when and if those invoices had already been provided to the Complainant. The Custodian also argued that some of the identified checks encompassed several payments, resulting in multiple invoices and required additional time to locate.

The Custodian also argued that a requestor cannot be denied access to documents already in his or her possession. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008); see also Caggiano v. Office of the Governor, GRC Complaint No. 2014-408. The Custodian asserted that because the Complainant already requested and received most of the records, the Complainant’s current request for copies already in his possession was not a genuine effort to obtain government records and did not comport with the purpose of OPRA. Blay v. Ocean Cnty. Health Dep’t, GRC Complaint No. 2012-223 (June 2013).

Additionally, the Custodian asserted that the Complainant’s “immediate access” argument ignores the text of the law which states that “[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e) (emphasis added). The Custodian noted that the Legislature understood that there may be circumstances where immediate access would not be feasible. The Custodian argued that because the Complainant sought records spanning over several years, additional time was needed to locate those responsive records that were not already provided.

Lastly, the Custodian argued 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

Immediate Access

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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,

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.

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 dated October 31, 2007).

Likewise, barring extenuating circumstances, a custodian’s failure to respond immediately in writing to a complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁵ See Cody v. Middletown Twp. Public Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records).

Here, the subject OPRA request sought “invoices” related to a list of checks issued to Mr. Loalbo. Invoices are indisputably considered records subject to “immediate access.” N.J.S.A. 47:1A-5(e). The evidence in the record indicates that the Custodian did not initially respond to the Complainant’s request until April 12, 2017, the fifth (5th) business day following receipt of the request, seeking an extension. While it may have been reasonable for the Custodian to seek an extension due to the nature of the request, she “had an obligation to immediately” respond to the Complainant but failed to do so. See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s April 3, 2017 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98; Herron, GRC 2006-178; Harris, GRC 2011-65. However, the Council declines to order disclosure as the evidence in the record demonstrates that the Custodian provided responsive records on May 11, 2017.

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],

⁵ OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

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 failure to respond to the April 3, 2017 OPRA request immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately responded to the request by producing responsive records that had not been previously provided. 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 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s April 3, 2017 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). However, the Council declines to order disclosure as the evidence in the record demonstrates that the Custodian provided responsive records on May 11, 2017.
2. The Custodian’s failure to respond to the April 3, 2017 OPRA request immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately responded to the request by producing responsive records that had not been previously provided. 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 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: Samuel A. Rosado
Staff Attorney

May 14, 2019