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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

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

Complaint No. 2018-69

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 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 has borne her burden of proof that she timely responded to the Complainant’s December 19, 2017 OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. Because Kean University Alumni Association is not a “public agency” for the purposes of OPRA, the Custodian lawfully denied access to the Complainant’s December 19, 2017 OPRA request by stating that Kean University does not make or maintain records of the Kean University Alumni Association. N.J.S.A. 47:1A-6; Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), and Sussex Commons Assocs., LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012). See also Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).

Final Decision Rendered by the
Government Records Council
On The 26th Day of February 2020

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: March 3, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2018-69

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

Meeting minutes of the Alumni Association from 2015 to the present.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: December 19, 2017

Response Made by Custodian: December 22, 2017; January 9, 2018; January 23, 2018

GRC Complaint Received: April 16, 2018

Background³

Request and Response:

On December 19, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 22, 2017, the Custodian responded in writing, advising the Complainant that an extension until January 9, 2018 was necessary to process the OPRA request appropriately. On January 9, 2018, the Custodian responded in writing, advising that an extension until January 23, 2018 was necessary to process the OPRA request appropriately. On January 23, 2018, the Custodian responded in writing, stating that Kean University (“Kean”) did not make or maintain records of the Alumni Association (“Association”). The Custodian then stated that as a result there were no responsive records to the Complainant’s request.

Denial of Access Complaint:

On April 16, 2018, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by Kraig. M. Dowd, Esq., of Weber Dowd Law, LLC (Woodland Park, NJ). Previously represented by Deputy Attorney General Beth Shore.

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.

Government Records Council (“GRC”). The Complainant asserted that subsequently after submitting his OPRA request, he received several extension letters from the Custodian. The Complainant then asserted he stopped receiving correspondence from the Custodian regarding the instant matter but was unable to say exactly how many extension letters he received from the Custodian.

The Complainant also asserted that he requested a status update on the instant matter within the e-mails sent to the Custodian on February 6, 2018, March 23, 2018, and April 2, 2018 pertaining to other matters. The Complainant contended that the Custodian responded, she did not reference the instant matter. The Complainant asserted that the Custodian’s failure to respond to his request resulted in a knowing and willful violation of OPRA. The Complainant also argued that if Kean were to respond that no responsive records exist, then the Custodian was complicit in financial wrongdoing.

Statement of Information:

On May 16, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 19, 2017. The Custodian certified that she forwarded the request to University Counsel for legal review. The Custodian certified that she forwarded an extension letter on December 22, 2017 because Kean was scheduled to close for the holiday break. The Custodian then certified that a final extension letter was sent on January 9, 2018, as consultation with University Counsel was ongoing. The Custodian certified that upon confirming that Kean and the Association were separate entities, she responded on January 23, 2018, stating that Kean did not make or maintain the requested records.

The Custodian first argued that the matter should be dismissed as frivolous and without any factual basis. N.J.S.A. 47:1A-7(e); N.J.A.C. 5:05-2.1(d). The Custodian then asserted that she fulfilled her obligations under OPRA by properly seeking two (2) extensions and provided a response within the extended period.

Additional Submissions:

On May 16, 2018, the Complainant provided several e-mails to the GRC in response to the Custodian’s SOI. The Complainant attached an excerpt from Kean’s December 2, 2017 Board of Trustees meeting agenda, where a resolution was voted on and approved to move services and responsibilities related to fundraising and alumni affairs to the Kean University Foundation, Inc. (“Foundation”). The Complainant contended that the Custodian should have thus forwarded his OPRA request to the Custodian who handled alumni affairs issues, citing Rodriguez v. Kean University, GRC Complaint No. 2015-363 (May 2017). The Complainant asserted that the Custodian was lying in her assertion that Kean did not make or maintain Association records.

The Complainant also attached screenshots of the Association’s staff directory webpage, which listed Alissa DiScala as the “Acting Director of Alumni Relations” under the heading “Office of Alumni Relations.” The Complainant also attached a screenshot of Ms. DiScala’s LinkedIn social media page. The Complainant asserted that Ms. DiScala’s title of “Acting Director of Alumni Relations at Kean University” on her LinkedIn page was further evidence of the

Association's connection with Kean. The Complainant also provided a screenshot of Kean's "Alumni Relations" section on its website, where it referred to "The Kean University Alumni Association" under the "Our Mission" heading and listed their location as Kean's. The Complainant further contended that under Kean's organizational chart, Acting Vice President for Kean's Division of Institutional Advancement ("Division") Audrey M. Kelly oversaw matters regarding the Foundation as well as alumni affairs.

On May 17, 2018, the Complainant e-mailed the GRC, asserting that the Association has been part of Kean since its founding in 1914. The Complainant asserted that if there was any formal separation between the organizations, then the Custodian should be required to cite the resolution or statute declaring same. The Complainant also provided evidence that Kean possessed meeting minutes of the Association for a few years after it was founded.

On August 14, 2018, the Complainant provided an additional e-mail to the GRC, contending that the Association was created in 1914 under the supervision of Kean's principal at the time. The Complainant contended that the evidence provided in this and previous e-mails demonstrated that the Association was public agency at the time of the request, and therefore its meeting minutes were subject to OPRA.

On November 9, 2018, the Custodian's previous counsel, Deputy Attorney General ("DAG") Beth Shore, sent a letter to the GRC, stating that Kean denied the Complainant's contention that the Association is part of Kean. DAG Shore also stated that should the GRC accept the Complainant's responses as an amendment to his complaint, then Kean would like an opportunity submit certifications in response to the allegations.

On December 19, 2019, the GRC sent an e-mail to the Custodian, stating that the GRC was granting Kean's request to provide certifications in response to the Complainant's assertions.⁴ The GRC also requested a response by the end of business on December 27, 2019.

On December 23, 2019, the Custodian requested a recalculation of the five (5) business days allotted to respond, as Kean would be closed between December 24, 2019 to January 1, 2020 for the holiday break. On December 30, 2019, the GRC granted the recalculated deadline to the end of business on January 6, 2020.

On January 6, 2020, the Custodian sought an extension of time to until January 13, 2020. The GRC granted the request that same day but noted that the Executive Director must approve further extension requests.

On January 10, 2020, the Custodian's current counsel, Kraig M. Dowd, Esq. ("Custodian's Counsel"), sent a letter of representation to the GRC, and requested an additional extension of time to respond to the Complainant's assertions. Custodian's Counsel contended that a Kean representative has been unavailable for consultation due to a family issue. Custodian's Counsel requested an extension to until the end of business on January 21, 2020. After consultation, the GRC's Executive Director granted the extension to January 21, 2020 to respond.

⁴ The GRC also noted that DAG Shore was no longer representing the Custodian and requested a notice of any current representation.

On January 21, 2020, Custodian's Counsel provided a response to the Complainant's allegations, with certifications from the Custodian and Audrey M. Kelly. Ms. Kelly certified that in December 2017, the Division was tasked with managing alumni matters, and that the portion of the Division which directly handled those matters was referred to as the "Office of Alumni Affairs" ("Alumni Affairs"). Ms. Kelly then certified that while Alumni Affairs coordinated with the Association when appropriate, the Association did not staff employees from, report to, or receive funding or financial support from Kean. Ms. Kelly also certified that the Association was not subject to Kean's control and had complete autonomy over its fundraising and investments. Ms. Kelly certified that the Association did not maintain any office space on Kean's campus, but instead owned a building adjacent to Kean's East Campus area.

The Custodian certified that it was her understanding that the Association was not a public agency under OPRA, but a separate non-profit organization. The Custodian certified that based upon that understanding she informed the Complainant in her response that Kean did not make or maintain records of the Association.

Custodian's Counsel argued that based upon these certifications, the Complainant was incorrectly conflating the Division with the Association. Custodian's Counsel asserted that because the Association was not a public agency, the Custodian had no obligation to forward the Complainant's request or direct the Complainant pursuant to N.J.S.A. 47:1A-5(h).

On January 21, 2020, the Complainant responded to Custodian's Counsel's submission and accompanying certifications. The Complainant contended that the Association's tax filings suggested that it had a subsidiary relationship with the Foundation. On January 24, 2020, the Complainant provided additional correspondence, arguing that the Association's was physically located on Kean's East Campus, and was not adjacent to it. The Complainant contended that the building was listed as a public school, and that the Association's Board of Directors held meetings therein. The Complainant requested that the GRC find that Ms. Kelly lied in her certification and take punitive measures against her and Custodian's Counsel.

On January 25, 2020, the Complainant provided additional correspondence to the GRC, contending that iterations of the Association's website from 2016 suggested a more intricate relationship between the Association and the Foundation. The Complainant asserted that this evidence served as a rebuttal to Ms. Kelly's certification that the Association did not receive assistance from the Foundation.

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).⁵ 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 dated October 31, 2007).

Here, the Complainant submitted his Denial of Access Complaint arguing the Custodian failed to respond to his December 19, 2017 OPRA request after seeking several extensions. In the SOI, the Custodian certified that she received the OPRA request on December 19, 2017, and responded in writing on December 22, 2017, seeking a time extension to January 9, 2018 to fulfill the request. The Custodian also certified that on January 9, 2018, she requested an additional extension to January 23, 2018 to respond. The Custodian then certified that she responded to the Complainant on January 23, 2018. The Custodian included in her SOI copies of the extension letters as well as the January 23, 2018 response.

A review of the evidence of record supports a finding that the Custodian did not violate OPRA's response time provisions. Specifically, the Custodian timely responded to the Complainant's request on December 22, 2017, extending the deadline to respond and providing a date certain, and again on January 9, 2018. The Complainant acknowledged that he received extension letters from the Custodian regarding this request but could not provide details on when he received them. The record also indicates that the Custodian responded to the request on January 23, 2018.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's December 19, 2017 OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

Public Agency

OPRA defines a public agency as:

Any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

[N.J.S.A. 47:1A-1.1.]

⁵ 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.

In Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), the Supreme Court reviewed the Appellate Division’s holding that the New Jersey State League of Municipalities (“League”) is not a public agency under OPRA. The Court acknowledged that although the Appellate Division relied on its previous holding in Times of Trenton Publishing Corp. v. Lafayette Yard Cmty. Development Corp., 183 N.J. 519 (2005), it erred in “. . . importing into OPRA’s definition of ‘public agency’ the definition of a ‘public body’ found in the Open Public Meetings Act . . . [t]he language defining a ‘public body’ . . . under OPRA [is] distinctly different.” League of Municipalities, 207 N.J. at 504-05. The Court thus held that a creation test, as opposed to a governmental-function test, controlled in determining whether an entity was a public agency for purposes of OPRA:

In Lafayette Yard, we remained faithful to the text of [OPRA] and determined that, in essence, the nonprofit corporation (an ‘instrumentality’) was *created* by a public subdivision therefore making it a ‘public agency.’ See id. at 535-36 . . . The creation test, not the governmental-function test, controlled. Our decision in this case, finding that the [League] is a ‘public agency,’ is wholly consistent with . . . Lafayette Yard.

[Id. at 507.]

Subsequently in Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278, 289-90 (App. Div. 2013), the Appellate Division reversed a Law Division decision holding that the Firemen’s Association (“FA”) was not a “public agency.” The court provided a comprehensive history of the FA, which was established in 1885 by a group of “incorporated local firemen's relief associations, whose mission was to provide assistance to indigent firefighters and their families.” Id. at 279. However, the FA “changed over time, as a result of mandatory statutes, Department of Banking and Insurance regulations, and a judicial decision, Szabo v. N.J. State Firemen's Ass'n, 230 N.J. Super. 265 (Ch. Div. 1988).” Id. at 280. Notwithstanding the Court’s movement away from the “government function” test in Lafayette Yard in favor the “creation” test in League of Municipalities, 207 N.J. 489 (2011), the Appellate Division chose to apply both tests here.

The Firemen’s Ass’n court noted that, as discussed in League of Municipalities, 207 N.J. 489, OPRA lacked a “government function” test, but that “[w]hile proof of governmental function is not necessary to qualify an entity as a public agency, the Court [in League of Municipalities] did not preclude the possibility that such proof would be relevant and perhaps sufficient to qualify the entity.” 431 N.J. Super. at 289. See also Sussex Commons Assocs., LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012) (holding that Rutgers Law Clinic did not perform a government function and was not controlled by either Rutgers or any other government agency). The court thus determined that the FA was a “public agency” under OPRA, reasoning that it “owes its existence to state law, which authorized its creation, granted it powers, including powers over local associations, and barred the creation of a competing state association.” Firemen’s Ass’n, 431 N.J. Super. at 290 (citing N.J.S.A. 43:17-41). The court noted that the FA’s financial activities implicated OPRA’s aim to shed light on the fiscal affairs of government because it received substantial tax revenues, it had authority to assure those funds were properly spent, and it both disbursed funds and oversaw such disbursement by local groups. Id. The court further reasoned

that the Association served numerous government functions in addition to the receipt and management of tax revenues, including providing welfare benefits to a considerable number of public servants and regulating the activities of other corporate entities. Id. at 291.

In the instant matter, the Complainant argued that the Association was a subsidiary of the Foundation and/or Kean at the time he made his request. The Complainant asserted that because Kean's then-principal supervised the creation of the Association in 1914 and employed and paid the salary of Ms. DiScala, the creation test has been satisfied under League of Municipalities, 207 N.J. 489. The Custodian contended that the Association was a separate non-profit organization, was not staffed by Kean employees, and was not funded or financially supported by Kean. The Custodian also argued that the Association was managed by its own Board of Directors, with no reporting obligations to Kean.

An analysis using the creation test establishes that the Association is not a public agency. While the Complainant's evidence indicates that Kean's principal aided in the creation of the Association's predecessor, the Complainant did not point to a statutory authorization or recognition as was the case in League of Municipalities, 207 N.J. at 504, and Fireman's Ass'n, 431 N.J. at 280. Additionally, in Rutgers, the Court noted that neither Rutgers at large, or "any government agency controls the manner in which clinical professors and their students practice law." 210 N.J. at 547. Here, Ms. Kelly certified that a separate Board of Directors governed the Association and that Kean did not staff employees within the Association. While the Complainant noted the Association's website referencing Ms. DiScala as a staff member, there is no evidence suggesting that she has control over the Association's actions or makeup of its Board of Directors. Additionally, on Ms. DiScala's LinkedIn page, she lists "liaison with the Alumni Association Board" as one of her job duties as Acting Director of Alumni Relations.⁶ "Liaison" is defined as "communication or cooperation which facilitates a close working relationship between people or organizations."⁷ This suggests that Ms. DiScala neither directs nor governs the Association's activities, but instead facilitates cooperation between Kean and the Association as separate organizations.

Furthermore, the Complainant's excerpts of the Association's tax records do not indicate that Kean or the Foundation has total or even partial control of the Association's finances, or that the Association raises revenue on behalf of Kean or the Foundation. Thus, like the law clinic in Rutgers, 210 N.J. 531, the Association's structure, management, and funding is not determined or controlled by Kean or the Foundation, even though the Association was created with Kean's assistance.

Next, the GRC is satisfied that Association is not a public agency under the government-function test. In Rutgers, the Court considered significant the fact that "clinical legal programs . . . do not perform any government functions. They conduct no official government business and do not assist in any aspect of State or local government." 210 N.J. at 546. Similarly, the Association's serves former Kean students, and Kean exercises no control over the funds raised by the Association to benefit those students.

⁶ See Alissa (Giordano) DiScala, LinkedIn, <https://www.linkedin.com/in/alissa-discala-9a257712/> (last visited Feb. 6, 2020).

⁷ Liaison, Lexico Dictionaries | English, <https://www.lexico.com/en/definition/liaison> (last visited Feb. 6, 2020).

Accordingly, because the Association is not a “public agency” for the purposes of OPRA, the Custodian lawfully denied access to the Complainant’s December 19, 2017 OPRA request by stating that Kean does not make or maintain records of the Association. N.J.S.A. 47:1A-6; League of Municipalities, 207 N.J. 489; and Rutgers, 210 N.J. 531. See also Fireman’s Ass’n, 431 N.J. 278.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant’s December 19, 2017 OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. Because Kean University Alumni Association is not a “public agency” for the purposes of OPRA, the Custodian lawfully denied access to the Complainant’s December 19, 2017 OPRA request by stating that Kean University does not make or maintain records of the Kean University Alumni Association. N.J.S.A. 47:1A-6; Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), and Sussex Commons Assocs., LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012). See also Paff v. N.J. State Firemen's Ass’n, 431 N.J. Super. 278 (App. Div. 2013).

Prepared By: Samuel A. Rosado
Staff Attorney

February 19, 2020