



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

June 29, 2021 Government Records Council Meeting

Thomas Banksy
Complainant

Complaint No. 2019-185

v.

Kean University
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 2021 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 OPRA request numbers 1, 3 and 4 based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s request item number 2. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s request item number 2 either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a “deemed” denial of the Complainant’s request item number 2 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 Schools, 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).
3. The Custodian denied the Complainant access to request item number 2 by failing to respond to the request item immediately. However, the GRC declines to order disclosure of the records because the Custodian certified that she disclosed all non-exempt responsive records to the Complainant on September 6, 2019.
4. Although the Custodian violated 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), the Custodian did provide the Complainant with all records responsive to the request. Additionally, 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 do not rise to the



level of a knowing and willful violation of OPRA and an 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 29th Day of June 2021

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: July 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Thomas Banksy¹
Complainant**

GRC Complaint No. 2019-185

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: The Complainant stated that he is seeking the following information (the Complainant did not specify a preferred delivery method):

1. All information and correspondences (between hiring managers) regarding the hiring of Paul Casey as the "Managing Assistant Director of Internships."
2. Documents detailing the salary and benefits Mr. Casey is entitled to as "Managing Assistant Director of Internships."
3. Documents detailing the length of time the position/title of "Managing Assistant Director of Internships" has existed.
4. If the position/title has previously existed, please provide the hiring/termination documents of the last person who worked in that title/position.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: July 10, 2019

Responses Made by Custodian: July 23, 2019, August 21, 2019, September 5 and 6, 2019

GRC Complaint Received: August 29, 2019

Background³

Request and Responses:

On July 10, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 23, 2019, the University's seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that his request will require an extension of time until August 22, 2019, to be appropriately fulfilled. On August 21, 2019, the Custodian

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Weber Dowd Law, LLC (Woodland Park, NJ).

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.

responded in writing informing the Complainant that his request will require an extension of time until September 5, 2019, to be appropriately fulfilled.

Denial of Access Complaint:

On August 29, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he filed his OPRA request with the Custodian on July 10, 2019, and received the first response from the Custodian on July 24, 2019, requesting an extension of time until August 22, 2019. The Complainant stated that the response was outside the designated period for a response. The Complainant stated that on August 21, 2019, the Custodian sent him correspondence requesting another extension of time until September 7, 2019.⁴ The Complainant stated that he believes Kean University is circumventing the law to deny him access to the requested records. The Complainant alleged that Kean University has a history of denying requests upon dubious grounds.

Supplemental Response:

On September 5, 2019, the Custodian responded in writing informing the Complainant that his request will require an extension of time until September 12, 2019, to be appropriately fulfilled. On September 6, 2019, the Custodian disclosed to the Complainant all responsive non-exempt records.

Statement of Information:

On September 20, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 10, 2019, and upon reviewing the request “determined that the title specified in the OPRA Request was not an exact match to University records.” The Custodian certified that a search was conducted to identify employee Paul Casey’s accurate title in order to locate responsive records. The Custodian certified that she determined request item number 1 consisted of advisory, consultative and deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Custodian certified that in order to allow for a search of records responsive to the remaining request items she requested an extension of time until July 23, 2019. The Custodian certified that the request was made within OPRA’s seven (7) business day time frame because “most Kean University offices are closed on Fridays during the summer.” The Custodian certified that she requested two (2) additional extensions of time, on August 21, 2019 and September 5, 2019, before fulfilling the request on September 6, 2019.

The Custodian certified that her processing of the requests was reasonable under the standards set forth in OPRA and applicable case law. The Custodian certified that during the extended time periods she was working with multiple offices to confirm the accurate title of Paul Casey and ensure that exhaustive searches were completed prior to finalizing a response so as not to inadvertently omit responsive records. The Custodian cited Rodriguez v. Kean University,

⁴ The evidence of record reveals that the Custodian requested an extension of time until September 5, 2019, not September 7, 2019.

GRC Complaint No. 2016-196 (February 2018) and N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) in support of her argument.

The Custodian certified that there had not been an unlawful denial of access because the extensions of time were reasonable and timely. The Custodian further certified that on September 6, 2019, she disclosed all responsive records to the Complainant, with the exception of the exempt records responsive to request item number 1.

Additional Submissions:

On September 24, 2019, the Complainant e-mailed the GRC asking if he was allowed to respond to the SOI. On September 24, 2019, the GRC e-mailed the Complainant to inform him that the GRC would allow five (5) business days for a reply to the SOI; therefore, the deadline date for the reply would be October 1, 2019.⁵

On May 11, 2021, the GRC sent a request for additional information to the Custodian's Counsel. The GRC requested a certification from the Custodian listing the days of the week that the administrative offices were staffed and open for business, as well as the posted business hours for the period July 1, 2019 to September 15, 2019.

On May 14, 2021, the Custodian submitted a certification to the GRC, wherein the Custodian averred that for the period July 1, 2019 through August 16, 2019, Kean's administrative offices were staffed and open for business Monday through Thursday of each week and the posted business hours were 8:15 a.m. to 5:30 p.m. The Custodian further certified that during the first week of July, the posted business hours were 7:45 a.m. to 5:30 p.m. and the offices were closed on the July 4, 2019 holiday. The Custodian certified that for the period August 19, 2019 through September 15, 2019, Kean's administrative offices were staffed and open for business Monday through Friday of each week and the posted business hours were 9:00 a.m. to 5:00 p.m., with the exception of the Labor Day holiday on September 2, 2019.

Analysis

Timeliness

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).⁶ 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

⁵ The Complainant did not submit a reply to the SOI, or otherwise further communicate with the GRC.

⁶ 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.

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).

The Complainant asserted that on July 24, 2019, the Custodian requested an extension of time until August 22, 2019. The Complainant further asserted that on August 21, 2019, the Custodian requested another extension of time until September 7, 2019. The Complainant stated that the Custodian, by requesting the extensions, unlawfully denied him access to the requested records.

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. N.J. 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. 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. 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. N.J. 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. N.J. 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."

Here, the evidence of record reveals that the Custodian requested an extension of time until August 22, 2019 on July 23, 2019, the seventh (7th) business day following receipt of the request. Based upon the operating hours of Kean University, this was an extension of eighteen (18) business days. On August 21, 2019, prior to expiration of the first extension, the Custodian requested another extension of time until September 5, 2019. This was an extension of nine (9) additional business days. On September 5, 2019, the Custodian requested an extension of time until September 12, 2019; however, the Custodian disclosed to the Complainant all responsive non-exempt records on September 6, 2019, for a total cumulative extension of time consisting of twenty-nine (29) business days.

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 Complainant's request sought four (4) request items, so the request was moderately complex. Further, the identification and retrieval of the requested records was hindered because the Custodian certified that the title specified in the request was not a match to University records; therefore, a more detailed search had to be conducted to identify the named employee in order to locate responsive records. The Custodian also certified that during the extended time periods she was working with multiple offices to confirm the accurate title of the named employee and to ensure that thorough searches were completed to avoid omitting any responsive records. Based upon the additional effort that was required to conduct the search due to the Complainant's partially unclear request, the extensions of time were reasonable. Moreover, in

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*.

Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018), the Council found that the Custodian's cumulative twenty-nine (29) business day extension to respond was reasonable due to the complexity of the request.

As such, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request numbers 1, 3, and 4 based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See also Rodriguez, GRC 2016-196.

With respect to request item number 2, 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).⁸ See Cody v. Middletown Twp. Public Schools, 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 immediately notify the complainant as to the status of immediate access records.

Here, request item number 2 sought employee salary records, which are immediate access records. The Custodian initially responded to the Complainant on the seventh (7th) business day following receipt of the OPRA request to inform the Complainant that his request would require an extension of time to be appropriately fulfilled. However, the Custodian failed to immediately advise the Complainant as to the status of the immediate access records. Likewise, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's request item number 2. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request item number 2 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 item number 2 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 and Harris, GRC 2011-65. See also Herron, GRC 2006-178.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

⁸ 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).

Here, the Custodian denied the Complainant access to request item number 2 by failing to respond to the request item immediately. However, the GRC declines to order disclosure of the records because the Custodian certified that she disclosed all non-exempt responsive records to the Complainant on September 6, 2019.⁹

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)).

Although the Custodian violated 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), the Custodian did provide the Complainant with all records responsive to the request. Additionally, 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 do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

⁹ The GRC notes that, except for the response to request item number 2, the extensions of time to respond taken by the Custodian were reasonable. As such, by verifying the Denial of Access Complaint on August 22, 2019, but for the Custodian’s failure to immediately respond to request item number 2, this complaint would have been unripe for adjudication.

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request numbers 1, 3 and 4 based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's request item number 2. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's request item number 2 either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a "deemed" denial of the Complainant's request item number 2 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 Schools, 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).
3. The Custodian denied the Complainant access to request item number 2 by failing to respond to the request item immediately. However, the GRC declines to order disclosure of the records because the Custodian certified that she disclosed all non-exempt responsive records to the Complainant on September 6, 2019.
4. Although the Custodian violated 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), the Custodian did provide the Complainant with all records responsive to the request. Additionally, 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 do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart
Staff Attorney

June 22, 2021