



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

December 15, 2020 Government Records Council Meeting

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

Complaint No. 2019-39

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 Supplemental 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 complied with the Council’s November 10, 2020 Interim Order because she responded in the prescribed time frame certifying that no responsive records existed and included a certification from Dean Mohny to support her response. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA 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 15th Day of December 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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2019-39

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following related to Michael Graves College of Architecture's ("College") attempts to obtain accreditation from the National Architectural Accrediting Board ("NAAB"):

1. Annual Reports.
2. NAAB responses to the Annual Reports.
3. Final Decision letter from the NAAB.
4. Architecture Program Report (2014-2015)
5. Visiting Team Report (2015).

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: October 22, 2018
Response Made by Custodian: October 31, 2018
GRC Complaint Received: February 15, 2019

Background

November 10, 2020 Council Meeting:

At its November 10, 2020 public meeting, the Council considered the October 27, 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, found that:

1. The Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). The Custodian must locate and disclose the responsive National Architectural Accrediting Board records to the Complainant inclusive of certifications from those who assisted in conducting the search. Should a sufficient search result in no responsive records, the Custodian, and

¹ No legal representation listed on record.

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

those Kean employees participating in the search are required to certify to this fact, inclusive of a search description.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 12, 2020, the Council distributed its Interim Order to all parties. On November 19, 2020, the Custodian responded to the Council's Interim Order attaching a legal certification from Dean David Mohney. The Custodian certified that upon receipt of the Council's Order, she initiated a new search and contacted Dean Mohney to perform another search. Mohney Cert. ¶ 6. The Custodian certified that Dean Mohney identified two (2) Annual Reports from 2018 and 2019 but noted that neither was in existence at the time of the Complainant's OPRA request. Mohney Cert. ¶ 6(a). The Custodian affirmed that notwithstanding that the reports postdated the subject OPRA request, she arranged for and was disclosing same to the Complainant as part of this submission. The Custodian certified that no additional records exist. Mohney Cert. ¶ 6(b)-(e).

Analysis

Compliance

At its November 10, 2020 meeting, the Council ordered the Custodian to perform a new search and either disclose the records located or certify they do not exist. The Council also ordered the Custodian to include a certification from the individual(s) that assisted in performing the search. The Council finally ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 12, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 19, 2020.

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On November 19, 2020, the fifth (5th) business day after receipt of the Council's Order, the Custodian responded to the Council's Order. Therein, the Custodian certified that no records responsive to the subject OPRA request existed. The Custodian also included Dean Mohney's certification detailing his search and the reasons why no records existed. It should be noted that the Custodian did disclose Annual Reports for 2018 and 2019; however, she was under no obligation to do so because they came into existence after the Complainant submitted his OPRA request. See Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Delbury v. Greystone Park Psychiatric Hospital (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014). Thus, compliance has been achieved in the instant complaint.

Therefore, the Custodian complied with the Council's November 10, 2020 Interim Order because she responded in the prescribed time frame certifying that no responsive records existed and included a certification from Dean Mohney to support her response. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Finally, because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's November 10, 2020 Interim Order because she responded in the prescribed time frame certifying that no responsive records existed and included a certification from Dean Mohney to support her response. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

December 8, 2020



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

INTERIM ORDER

November 10, 2020 Government Records Council Meeting

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

Complaint No. 2019-39

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 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 may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). The Custodian must locate and disclose the responsive National Architectural Accrediting Board records to the Complainant inclusive of certifications from those who assisted in conducting the search. Should a sufficient search result in no responsive records, the Custodian, and those Kean employees participating in the search are required to certify to this fact, inclusive of a search description.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 10th Day of November 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: November 12, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2019-39

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following related to Michael Graves College of Architecture's ("College") attempts to obtain accreditation from the National Architectural Accrediting Board ("NAAB"):

1. Annual Reports.
2. NAAB responses to the Annual Reports.
3. Final Decision letter from the NAAB.
4. Architecture Program Report (2014-2015)
5. Visiting Team Report (2015).

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: October 22, 2018
Response Made by Custodian: October 31, 2018
GRC Complaint Received: February 15, 2019

Background³

Request and Response:

On October 21, 2018, a Sunday, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Complainant noted that the College's website stated that the requested records were available to the public.⁴ On October 31, 2018, the Custodian responded in writing stating that an extension of time through November 14, 2018 is necessary to appropriately process the subject OPRA request. On November 14, 2018, the Custodian responded in writing advising the Complainant that no records responsive to his OPRA request existed.

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Webber 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.

⁴ <https://www.kean.edu/academics/michaelgraves/naab-statement> (last accessed September 30, 2020).

Denial of Access Complaint:

On February 15, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that notwithstanding the College’s website statement that the requested records are available to the public, the Custodian responded that none existed. The Complainant contended that the College’s website suggests that the Custodian lied in her response and that a knowing and willful violation occurred.

Statement of Information:

On March 8, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 22, 2018. The Custodian certified that she sent the subject OPRA request to the “Office of Record” for review. The Custodian certified that she responded in writing on October 31, 2018 obtaining an extension of time. The Custodian affirmed that the “Office of Record” responded on November 1, 2018 stating that no records existed, which prompted her to contact them in order to understand the response. The Custodian certified that after several conversations over the next week, it was determined that no records existed. The Custodian affirmed that she responded in writing on November 14, 2018 advising the Complainant that no records existed.

The Custodian that she lawfully denied access to the subject OPRA request because no records exist. Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005); O.R. ex rel. O.R. v. Kniewel, 2010 N.J. Super. Unpub. LEXIS 560 (App. Div. 2010). The Custodian contended that the “Office of Record” advised that none existed, and she responded to the Complainant accordingly.

Additional Submissions:

On March 9, 2019, the Complainant submitted a rebuttal to the SOI via e-mail. Therein, the Complainant argued that either the College’s website was wrong, or Kean University (“Kean”) staff were lying. The Complainant contended that the SOI is troubling because, for example, the attached 2018 NAAB assessment report for the College stated that it was required to make certain records electronically available to the public. The Complainant noted that one of those records is the Visiting Team Report that Kean certified did not exist. The Complainant requested that the GRC order the Dean of the College to submit an affidavit certifying to the conversations between his office and the Custodian, as well as the truthfulness that no records exist.

On March 13, 2019, the Complainant e-mailed the GRC attached an e-mail chain between himself and Associate Director Ellen S. Cathey of the NAAB. The Complainant asked that the attached e-mail be added to the record in this complaint. The Complainant stated that in summary, the NAAB offered to send the responsive records to him.⁵ The Complainant argued that it is implausible that no records existed when the group the records were created for and produced to are able to disclose them. The Complainant further argued that it seemed a clear knowing and willful violation occurred here.

⁵ It is not clear whether the NAAB offered to send him the exact records sought, or different versions of the records submitted as part of various accreditation applications.

Analysis

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

In the matter before the Council, the Complainant contended that the Custodian unlawfully denied access to his OPRA request on the basis that no records exist. The Complainant noted that the College’s own website signaled the existence and disclosability of the records sought. In the SOI, the Custodian certified that after conferring with the “Office of Record,” it was determined that no records existed. The Complainant subsequently refuted the SOI, arguing that Ms. Cathey offered to send him the records sought during the pendency of this complaint.⁶

While such a response typically results in a finding similar to Pusterhofer, GRC 2005-49, conflicting facts here require an outcome consistent with Carter, 2011-76. Specifically, the College’s own website provides that the records sought by the Complainant “are available to the public as they are prepared as part of the candidacy process in the Dean’s Office.” The GRC is further persuaded by the e-mail exchange between the Complainant and Ms. Cathey, wherein she advised him that certain records should be made available and would provide them to the Complainant upon request.

Also complicating this issue is the Custodian’s use of the term “Office of Record.” This term appears to be a generic identifier to whomever the Custodian contacted to address the subject OPRA request. However, this descriptor is not specific enough to determine if the Custodian even contacted those employees or departments that would have real knowledge of the existence of responsive records. The use of such a term only further detracts from the Custodian’s argument that no records existed. Thus, given the conflict between the College’s own website and the current assertion that no records exist, as well as the uncertainty of the term “Office of Record,” the GRC cannot find that a lawful denial of access occurred here.

Therefore, the Custodian may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carter, GRC 2011-76. The Custodian must locate and disclose the responsive NAAB records to the Complainant inclusive of certifications from those who assisted

⁶ There is no evidence in the record suggesting that the Complainant requested and received the records at issue here directly from the NAAB.

in conducting the search. Should a sufficient search result in no responsive records, the Custodian, and those Kean employees participating in the search are required to certify to this fact, inclusive of a search description.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). The Custodian must locate and disclose the responsive National Architectural Accrediting Board records to the Complainant inclusive of certifications from those who assisted in conducting the search. Should a sufficient search result in no responsive records, the Custodian, and those Kean employees participating in the search are required to certify to this fact, inclusive of a search description.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

October 27, 2020

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.