



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

April 26, 2022 Government Records Council Meeting

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

Complaint No. 2020-167

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 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 October 28, 2019 OPRA item No. 2 seeking “bills” and “invoices”. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request item No. 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 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 December 16, 2019 and September 17, 2020.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 28, 2019 OPRA request item No. 3 based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Rodriguez v. Kean Univ., GRC Complaint No. 2017-132 (February 2019). Although a portion of the extensions were valid as a result of the ongoing public health emergency, the extensions leading up to the public health emergency were unreasonable. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Council declines to order disclosure as the evidence in the record demonstrates that the Custodian provided responsive records on September 17, 2020.



3. The Custodian's failure to respond to the Complainant's OPRA request item No. 2 immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). Additionally, the Custodian's unnecessary extensions incurred prior to the public health emergency resulted in a "deemed denial" of the remainder of the OPRA request. However, the Custodian ultimately responded to the request by providing records on December 19, 2019 and September 17, 2020. 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 26th Day of April 2022

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: April 28, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2022 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2020-167

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All OPRA complaints filed against Kean University (“Kean”) in either the GRC or any Superior Court since January 2018.
2. All invoices or bills submitted with regard to any of the OPRA filings listed in (1), above.
3. All checks to OPRA claimants or their attorneys with regard to any of the matters comprising (1).

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: October 29, 2019

Response Made by Custodian: December 16, 2019; February 24, 2020

GRC Complaint Received: September 4, 2020

Background³

Request and Response:

On October 28, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 8, 2019, the seventh (7th) business day after receipt, the Custodian notified the Complainant that an extension of time was needed to respond and extended the deadline to December 2, 2019. On December 2, 2019, the Custodian extended the deadline to December 16, 2019.

On December 16, 2019, the Custodian responded in writing providing forty-one (41) pages of records responsive to request item No. 2. The Custodian also stated that an extension was needed

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Carolyn G. Labin. Previously 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

to respond to the remainder of the request. The Custodian stated that the extended deadline was January 17, 2020. On January 17, 2020, the Custodian extended the deadline to respond to February 7, 2020. On February 7, 2020, the Custodian extended the deadline to February 24, 2020.

On February 24, 2020, the Custodian responded to the Complainant in writing providing twenty-five (25) pages of records responsive to item No. 1. The Custodian added that because the Complainant was a party to several responsive complaints, those records were not provided since they were in the Complainant's possession. The Custodian added that additional time was needed to respond to the remainder of the request. The Custodian stated that the extended deadline was March 27, 2020.

On March 27, 2020, the Custodian extended the deadline to April 24, 2020. On April 24, 2020, the Custodian extended the deadline to May 22, 2020. May 22, 2020, the Custodian extended the deadline to June 22, 2020. On June 22, 2020, the Custodian extended the deadline to July 22, 2020. On July 22, 2020, the Custodian extended the deadline to August 26, 2020. On August 26, 2020, the Custodian extended the deadline to September 28, 2020.

Denial of Access Complaint:

On September 2, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that while the Custodian provided records responsive to item Nos. 1 & 2, Kean has continued to take extensions of time to provide responsive records for item No. 3. The Complainant asserted that Kean violated OPRA by failing to fulfill the request and continuing to extend the time to respond.

Supplemental Response:

On September 17, 2020, the Custodian responded to the Complainant in writing, providing forty-one (41) pages of record responsive to item Nos. 2 & 3. The Custodian also stated that some of the records were redacted pursuant to N.J.S.A. 47:1A-1.1. The Custodian further stated that because the Complainant was a party to some of the complaints at issue, records responsive to item Nos. 2 & 3 were not provided since it was determined that the Complainant was already in possession of same.

Statement of Information:

On October 21, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 28, 2019. The Custodian certified that the search included referring the request to several Kean offices. The Custodian asserted that because the request involved several offices and spanned two (2) years, extension requests were submitted to the Complainant on November 8, 2019 and December 2, 2019. The Custodian certified that she submitted her first response in writing on December 16, 2019, providing forty-six (46) pages of records responsive to item No. 2. The Custodian certified that an additional request was needed for the remaining records due to the upcoming holiday break.

The Custodian then certified that additional time was needed after the holiday break and informed the Complainant of additional extension requests on January 17, 2020 and February 7, 2020. The Custodian certified that on February 24, 2020, twenty-five (25) pages of records responsive to item No. 1 were provided to the Complainant. The Custodian certified that additional extensions were relayed to the Complainant through March 27, 2020.

The Custodian certified that the search and disposition process was then hindered due to the State-mandated closure of all colleges and universities on March 13, 2020, because of the COVID-19 pandemic. The Custodian certified that Kean implemented telecommuting arrangements for nonessential employees effective March 18, 2020, and an additional extension request was sent to the requestor on March 27, 2020. The Custodian certified that additional extensions were submitted to the Complainant through July 22, 2020 because of the State-mandated closure.

The Custodian certified that on August 3, 2020, Kean was reopened on a limited basis and the search for records resumed. The Custodian certified that a final extension request was sent to the Complainant on August 6, 2020, and forty-one (41) pages of records were provided on September 17, 2020. The Custodian certified that the records were responsive to item Nos. 2 & 3.

The Custodian first argued that this complaint was moot because the Complainant received the responsive records on September 17, 2020. Stop & Shop Supermarket, Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286 (App. Div. 2017); Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660 (App. Div. 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request). The Custodian noted that the courts have held that they “will not decide cases in which . . . a judgement cannot grant effective relief.” Cinque v. N.J. Dep’t of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993). See also N.J. Div. of Youth & Family Serv. v. W.F., 434 N.J. Super. 288, 297 (App. Div. 2014).

The Custodian next argued that even if the complaint is not dismissed as moot, it should be dismissed on the merits, as the extensions of time to respond were reasonable. N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian contended that Kean needed the additional time to consult with multiple offices due to the request’s scope, and the number of individuals needed to conduct the search. The Custodian also noted that the Complainant was provided with partial responses throughout the period. The Custodian further contended 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).

The Custodian further asserted that on March 20, 2020, Governor Phillip D. Murphy signed the amendment to OPRA which permitted the suspension of the statutory seven (7) business day deadline when “a state of emergency, public health emergency, or state of local disaster emergency” has been declared. See N.J.S.A. 47:1A-5(i)(2). The Custodian also asserted that

Governor Murphy declared a State of Emergency and a Public Health Emergency (“PHE”) on March 9, 2020, via Executive Order No. 103 (Murphy 2020) (“EO 103”). The Custodian asserted that the PHE was thereafter extended by Executive Order No. 119 (Murphy 2020) (“EO 119”), Executive Order No. 138 (Murphy 2020) (“EO 138”), Executive Order No. 151 (Murphy 2020) (“EO 151”), Executive Order No. 162 (Murphy 2020) (“EO 162”), Executive Order No. 171 (Murphy 2020) (“EO 171”), Executive Order No. 180 (Murphy 2020) (“EO 180”), and Executive Order No. 186 (Murphy 2020) (“EO 186”).

The Custodian argued that her office was unable to continue its search for responsive records since they were not accessible remotely, and therefore had to continuously extend the response time until receiving guidance from the State. The Custodian argued that when Kean reopened in August 2020, additional time was needed due to the limited staff onsite and backlog created as a result of the closure. The Custodian contended that her efforts were reasonable given the circumstances and that the extensions of time were appropriate.

Additional Submissions:

On October 15, 2020, the Complainant responded to the Custodian’s SOI in writing. The Complainant asserted that the instant matter was one of many that involved Kean’s repeated extensions of time to respond. The Complainant also noted that in many of those requests, the Custodian would provide the Complainant with the responsive records once she received the GRC’s request for an SOI. The Complainant asserted that the above demonstrates that the Custodian was committing a knowing and willful violation of OPRA.

On October 16, 2020, the Complainant e-mailed the GRC, further asserting that he should have been provided with the invoices far sooner and noted that such records were considered “immediate access” under OPRA. The Complainant argued that the delay in providing the records was suspect given that they contained “embarrassing” information regarding the Custodian and the legal costs incurred to Kean.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

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.

Item No. 2

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, request item No. 2 sought "invoices" or "bills" related to any GRC complaints or OPRA-related lawsuits filed from January 2018 through October 2019. Invoices and bills 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 November 8, 2019, the seventh (7th) 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 October 28, 2019 OPRA item No. 2 seeking "bills" and "invoices". N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request item No. 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 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 December 16, 2019 and September 17, 2020.

Item No. 3

Additionally, in Rivera, GRC 2009-317, 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 consent 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, GRC 2007-315, *et seq.*], the Custodian

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).

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, GRC 2010-68, 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. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep’t of Treas., 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.”

In the instant matter, the Custodian sought twelve (12) extensions for the Complainant’s October 28, 2019 OPRA request item Nos. 2 & 3. The Custodian’s extensions are as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
November 8, 2019	December 2, 2019	So that the OPRA request may “be appropriately processed.”
December 2, 2019	December 16, 2019	“To ensure an exhaustive search has been completed.”

December 16, 2019	January 17, 2020	“To appropriately process the remainder of your request.”
January 17, 2020	February 7, 2020	“To ensure an exhaustive search and to appropriately process the remainder of your request.”
February 7, 2020	February 24, 2020	“To ensure an exhaustive search and to appropriately process the remainder of your request.”
February 24, 2020	March 27, 2020	To “review documents identified based on the remainder of your request for responsiveness and redactions.”
March 27, 2020	April 24, 2020	“University operations have been impacted by COVID-19 guidelines and protocols.”
April 24, 2020	May 22, 2020	“University operations have been impacted by COVID-19 guidelines and protocols.”
May 22, 2020	June 22, 2020	“University operations have been impacted by COVID-19 guidelines and protocols.”
June 22, 2020	July 22, 2020	“University operations have been impacted by COVID-19 guidelines and protocols.”
July 22, 2020	August 26, 2020	“University operations have been impacted by COVID-19 guidelines and protocols.”
August 26, 2020	September 28, 2020	“University operations have been impacted by COVID-19 guidelines and protocols.”

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. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to respond effectively to the request.⁶ Id.

Regarding the request, the Complainant’s OPRA request item No. 3 sought copies of all checks written to OPRA litigants or attorneys pertaining to GRC complaints or superior court litigation. The Custodian extended the response time on twelve (12) occasions for a total of approximately (220) business days, accounting for public holidays. However, this estimate does

⁶ “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*.

not account for the time between March 2020 and August 2020 when Kean was closed due to the COVID-19 pandemic.

In analyzing the instant matter pursuant to Ciccarone, Kean's closure due to the pandemic plainly constitutes an extenuating circumstance. The Custodian certified that between March 2020 and August 2020, Kean was shuttered and operated remotely, inhibiting the Custodian's ability to process OPRA requests. Relying on the table above, approximately 100 out of the 220 extended business days were a result of the PHE. However, the repeated extensions incurred before the PHE warrant additional review.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2017-132 (February 2019) for instruction. There, the Complainant sought access to "any document" regarding Kean's itemized expenditures pertaining to Wenzhou Kean University from August 2016 to the present. The Custodian sought 122 business days of extensions to provide one (1) page of responsive records. The Council held that such an extension was unwarranted and unsubstantiated, noting that it took employees an extensive amount of time to advise the Custodian of the status of their search. The Council, in rendering this decision, noted that there were no "particularly harmful extenuating circumstances that would have warranted such a delay."

In the instant matter, the OPRA request sought records spanning several years, however before the pandemic the Custodian sought at least 100 business days to ultimately produce forty-one (41) pages of records. The GRC is thus persuaded that the extensions were excessive for the following reasons, relying on Rodriguez, GRC 2017-132.

First, the Custodian took approximately the same number of extended days to produce a limited number of records. Furthermore, the request item at issue is arguably more concise and easily identifiable compared to Rodriguez, GRC 2017-132. Moreover, the Custodian was able to locate the bills or invoices associated with the request and provide them to the Complainant on December 19, 2019, but did not elaborate on why several additional months were needed to locate and provide the associated checks.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the Complainant's October 28, 2019 OPRA request item No. 3 based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Rodriguez, GRC 2017-132. Although a portion of the extensions were valid as a result of the ongoing PHE, the extensions leading up to the PHE were unreasonable. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Council declines to order disclosure as the evidence in the record demonstrates that the Custodian provided responsive records on September 17, 2020.

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)).

Here, the Custodian’s failure to respond to the Complainant’s OPRA request item No. 2 immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). Additionally, the Custodian’s unnecessary extensions incurred prior to the PHE resulted in a “deemed denial” of the remainder of the OPRA request. However, the Custodian ultimately responded to the request by providing records on December 19, 2019 and September 17, 2020. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 28, 2019 OPRA item No. 2 seeking “bills” and “invoices”. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request item No. 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 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 December 16, 2019 and September 17, 2020.

2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's October 28, 2019 OPRA request item No. 3 based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Rodriguez v. Kean Univ., GRC Complaint No. 2017-132 (February 2019). Although a portion of the extensions were valid as a result of the ongoing public health emergency, the extensions leading up to the public health emergency were unreasonable. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Council declines to order disclosure as the evidence in the record demonstrates that the Custodian provided responsive records on September 17, 2020.
3. The Custodian's failure to respond to the Complainant's OPRA request item No. 2 immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). Additionally, the Custodian's unnecessary extensions incurred prior to the public health emergency resulted in a "deemed denial" of the remainder of the OPRA request. However, the Custodian ultimately responded to the request by providing records on December 19, 2019 and September 17, 2020. 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

April 19, 2022