



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. 2020-168

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 the matter is without any reasonable factual basis to pursue, since the Custodian certified that she did not receive the June 12, 2020 OPRA request. N.J.S.A. 47:1A-7(e). Further, the evidence reflects that the OPRA request was sent to the Kean University Foundation, a separate and distinct entity from the Custodian’s agency. N.J.S.A. 47:1A-5(g); Moawad v. City of Bayonne Police Dep’t (Hudson), GRC Complaint No. 2017-162 (November 2017). Thus, the matter shall be dismissed.

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. 2020-168

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “Statements for the [Kean University Realty Foundation (“Realty Foundation”)] or a link on which they are located.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: N/A

Response Made by Custodian: N/A

GRC Complaint Received: September 8, 2020

Background³

Prior Request and Response:

On June 3, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) to Kean University (“Kean”) and Kean University Foundation, Inc., (“Foundation”) seeking “a copy of all [Realty Foundation] consolidated financial statements from 2011 to the present.”

On June 4, 2020, the Custodian responded in writing stating that Kean did not make, maintain, or receive copies of the requested records. The Custodian also stated that the request appeared to be directed to the Foundation and that Kean was not responding on behalf of the Foundation.

On June 12, 2020, the Foundation responded to the Complainant in writing stating that same did not possess responsive records to the request.

Request and Response:

On June 12, 2020, the Complainant submitted an OPRA request to the Foundation seeking

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.

the above-mentioned records as a clarification of the June 3, 2020 OPRA request. On June 29, 2020, the Foundation responded to the Complainant in writing, stating initially that the Foundation was no longer affiliated with Kean and has become an independent non-governmental foundation. The Foundation also stated that to satisfy the request, Kean was contacted to determine which records, if any, they were willing to disclose. The Foundation therefore requested an extension until July 15, 2020 to try to obtain the records.

On July 18, 2020, the Complainant contacted the Foundation regarding the status of the request. On July 20, 2020, the Foundation responded to the Complainant stating that limited staffing at offices due to the pandemic has made processing the request more difficult. The Foundation requested an additional thirty (30) days to respond. That same day, the Complainant responded to the Foundation, consenting to the extension.

On August 21, 2020, the Complainant requested an additional update on the request, noting that Kean employees should be back at the office. On August 28, 2020, the Foundation requested an additional two (2) weeks to respond to the request. The Complainant responded that same day, stating that he was told previously that Kean had possession of the records.

Denial of Access Complaint:

On September 8, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his June 3, 2020 request to the Foundation, noting that same was part of Kean until 2018 or 2019. The Complainant asserted that he received a response from the Foundation on June 12, 2020. The Complainant then stated that he submitted his June 12, 2020 request to the Foundation as a clarification of his June 3, 2020 request.

The Complainant argued that since his submission, the Foundation has extended the time to respond repeatedly. The Complainant contended that he has not received a response from the Foundation or Kean to date and should be found in violation of OPRA accordingly.

Statement of Information:

On September 24, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she did not receive the OPRA request that is the subject of the instant complaint. The Custodian therefore certified that no response was provided to the Complainant since it was not addressed to Kean.

With regard to the June 3, 2020 OPRA request, the Custodian asserted that an initial review determined that the request was not intended for Kean, but instead the Foundation. The Custodian asserted that the sole member of the Realty Foundation is the Foundation. The Custodian asserted that because the Foundation was a separate and independent entity, Kean did not make or maintain financial statements for the Foundation and informed the Complainant of same on June 4, 2020.

Regarding the June 12, 2020 OPRA request, the Custodian asserted that same was a clarification of the June 3, 2020 OPRA request, but submitted exclusively to the Foundation. The

Custodian asserted that while the Foundation contacted Kean’s legal counsel regarding the request, Kean was not asked to conduct a search for responsive records or provide any records on the Foundation’s behalf. The Custodian certified that she was advised by the Foundation that the Complainant was provided access to all responsive records on September 18, 2020.

The Custodian argued that Kean did not take “improper” extensions since Kean did not receive the Complainant’s June 12, 2020 OPRA request, and therefore had no need to request any extension. The Custodian argued that there was no unlawful denial of access since she certified that she did not receive the subject OPRA request. See Valdes v. New Jersey Dep’t of Educ., GRC Complaint No. 2012-19 (April 2019). The Custodian also contended that the Complainant has not been unlawfully denied access since the Foundation has provided the Complainant with access to the records. See Desoto v. City of Bayonne, GRC Complaint No. 2012-243 (July 2013).

Additional Submissions:

On September 24, 2020, the Complainant corresponded with Counsel for the Foundation regarding access to the responsive records. On September 25, 2020, the Complainant e-mailed the GRC, Kean, and the Foundation, requesting in part for the GRC to order Kean and the Foundation develop a “transparent and requestor-friendly process for handling OPRA requests.”

On October 14, 2020, the Complainant e-mailed the GRC, asserting that while the SOI referenced communications between Kean and the Foundation, the Custodian did not elaborate what advice Kean provided to the Foundation, if any. The Complainant also stated the SOI did not discuss communications between Kean’s legal counsel and the Custodian regarding this request and other requests for Foundation documents.

The Complainant asserted that disclosure of these communications may reveal whether one party advised against disclosing records, and whether Kean performed its duty to provide public documents. The Complainant asserted that Kean maintained a responsibility to public access to documents, even if same were in the Foundation’s possession.

Analysis

Unlawful Denial of Access

OPRA mandates that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g). Additionally, OPRA states that “The council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis*.” N.J.S.A. 47:1A-7(e) (emphasis added).

In Moawad v. City of Bayonne Police Dep’t (Hudson), GRC Complaint No. 2017-162 (November 2017)⁴, the Council administratively dismissed the matter, finding that the evidence of record demonstrated that the complainant submitted the request to the Hudson County Prosecutor’s

⁴ The Appellate Division would thereafter uphold the GRC’s decision in Moawad v. City of Bayonne Police Dep’t (Hudson), 2018 N.J. Super. Unpub LEXIS 2487 (2018).

Office, a separate and distinct agency from the custodian's agency. The Council also noted that the complainant failed to provide evidence to contradict the custodian's certification.

In the instant matter, the Custodian certified that she did not receive the June 12, 2020 OPRA request from the Complainant. Additionally, the evidence of record demonstrates that while the Complainant submitted the June 3, 2020 OPRA request to both the Foundation and Kean, the June 12, 2020 clarified request was sent only to the Foundation. Furthermore, the Complainant conceded in his Denial of Access Complaint that the Foundation was no longer part of Kean well before submitting the instant request. Like Moawad, Kean and the Foundation were separate and distinct entities at the time of the request. The GRC also notes that Kean responded to the Complainant's June 3, 2020 OPRA request on June 4, 2020, stating that no responsive records exist and that their response was not on behalf of the Foundation.

Accordingly, the matter is without any reasonable factual basis to pursue, since the Custodian certified that she did not receive the June 12, 2020 OPRA request. N.J.S.A. 47:1A-7(e). Further, the evidence reflects that the OPRA request was sent to the Foundation, a separate and distinct entity from the Custodian's agency. N.J.S.A. 47:1A-5(g); Moawad, GRC 2017-162. Thus, the matter shall be dismissed.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the matter is without any reasonable factual basis to pursue, since the Custodian certified that she did not receive the June 12, 2020 OPRA request. N.J.S.A. 47:1A-7(e). Further, the evidence reflects that the OPRA request was sent to the Kean University Foundation, a separate and distinct entity from the Custodian's agency. N.J.S.A. 47:1A-5(g); Moawad v. City of Bayonne Police Dep't (Hudson), GRC Complaint No. 2017-162 (November 2017). Thus, the matter shall be dismissed.

Prepared By: Samuel A. Rosado
Staff Attorney

April 19, 2022