



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

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

Complaint No. 2020-26

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 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 based on warranted and substantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018). 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).
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainants’ OPRA request seeking “all documents” regarding capital improvements over a nearly eight (8) year period. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 23rd Day of February 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: February 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2020-26

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all documents” between Kean University (“Kean”) and Gourmet Dining (“Gourmet”) related to previous capital improvements described in Amendment No. 3 of their food services contract (effective March 24, 2017) from 2012 through present.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: November 7, 2019
Response Made by Custodian: November 15, 2019
GRC Complaint Received: January 31, 2020

Background³

Request and Response:

On November 6, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 15, 2019, the Custodian responded in writing advising that an extension of time until December 13, 2019 was necessary due to the “breadth and time span” of the subject OPRA request. On December 13, 2019, the Custodian responded in writing advising that an extension of time until January 17, 2020 was necessary to ensure an exhaustive search for responsive records. On January 17, 2020, the Custodian responded in writing advising that an extension of time until February 21, 2020 was necessary to ensure an exhaustive search for responsive records.

Denial of Access Complaint:

On January 31, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated

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.

OPRA by continuously extending the time frame to respond to his OPRA request. Additionally, the Complainant asserted that the Custodian failed to provide a “valid and legal response . . . (either granting or denying [access]).”

Supplemental Responses:

On February 11, 2020, the Custodian responded in writing stating that despite the “overly broad nature” of the subject OPRA request, an exhaustive search resulted in no responsive records.

Statement of Information:

On February 11, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 7, 2020. The Custodian certified that her search included sending the subject OPRA request to the “office of record” for review. The Custodian averred that after that “office of record” responded that no records existed, she forwarded the request to another “office of record.” The Custodian certified that she responded in writing on November 15, 2019 seeking an extension because the second “office of record” had not yet responded to her. The Custodian certified that she extended the time frame again because the second “office of record” was still reviewing the subject OPRA request and due to the upcoming holiday break.

The Custodian certified that she subsequently sent the subject OPRA request to a third “office of record” as part of her continued effort to ensure a complete search. The Custodian affirmed that she sought the third extension because both offices had not responded. The Custodian certified that each “office of record” responded on January 21, and February 7, 2020 respectively advising that no records existed. The Custodian certified that she subsequently responded to the Complainant in writing on February 11, 2020 advising that no records existed.

The Custodian contended that her time extension requests were reasonable. N.J. Builders Ass’n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018). The Custodian maintained that the subject OPRA request sought records between Kean and a private company spanning approximately seven (7) years. The Custodian asserted that Kean needed the additional time to conduct an exhaustive search across three (3) offices. The Custodian noted that the overly broad nature of the Complainant’s OPRA request and pending winter break also contributed to the need for additional time for response.

The Custodian further argued that no unlawful denial of access occurred here. The Custodian averred that she responded within the extended time frame advising the Complainant that no records existed. The Custodian argued that prior GRC case law supports that she did not violate OPRA. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Rodriguez v. Kean Univ., GRC Complaint No. 2015-339 (June 2017).

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

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 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 v. NJ 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. 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 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.”

In the instant matter, the Custodian sought three (3) extensions for the Complainant’s OPRA request. The Custodian’s extensions are as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
November 15, 2019	December 13, 2019	Due to the breadth and time span of the OPRA request.
December 13, 2019	January 17, 2020	To “ensure an exhaustive search has been completed.”
January 17, 2020	February 21, 2020	To “ensure an exhaustive search has been completed.”

The Custodian extended the response time on three (3) occasions for a total of approximately sixty (60) business days, accounting for public holidays and closures. As noted above, a requestor’s approval is not required for a valid extension. However, it should be noted that the Complainant did not object to any extension prior to filing this complaint.

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.⁴ Id.

Regarding the request, the Complainant sought “all documents” between Kean and Gourmet regarding capital improvements as described in a food services contract spanning nearly eight (8) years.⁵ In the SOI, the Custodian explained Kean’s search or records responsive to the “overly-broad” request, which involved coordinating with three (3) “office[s] of record.” A potential stressor on the need for additional extensions was the loss of time due to holiday closures.

⁴ “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*.

⁵ The GRC notes that the Complainant’s OPRA request is invalid on its face because it fails to identify any specific records sought. MAG, 375 N.J. Super. at 546; Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).

The Custodian ultimately responded nine (9) business days prior to the expiration of the final extension advising that no records existed.

From the Custodian's receipt of the Complainant's OPRA request, she initially sought eighteen (18) business days to respond. The Custodian then sought two (2) additional extensions comprising approximately forty-two (42) business days. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of three (3) full months of business days. However, the Custodian's response effectively eliminated nearly two (2) weeks of business days, thus decreasing the overall extension time frame to two and a half months of business days.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decisions in Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017) and Rodriguez, GRC 2016-196 for a comparison. In Rodriguez, GRC 2015-312, the Council found that the Custodian's thirty-nine (39) business day extension to respond that no records exist was unreasonable. The Council also took the custodian and a Kean employee to task for lacking urgency in responding. In Rodriguez, GRC 2016-196, the Council found the facts to be distinguishable from Rodriguez, GRC 2015-312 and determined that the extensions were reasonable. In reaching its conclusion, the Council reasoned that the request there required a more significant search. The Council also found that the Custodian's early response coming four (4) days before the end of the extended time frame as compelling evidence that the extension was reasonable.

The GRC sees the facts here as more on point with Rodriguez, GRC 2016-196. Specifically, and notwithstanding that the Custodian sought twenty-one (21) more business days than in Rodriguez, GRC 2015-312, the length of time needed to reach a conclusion that no records existed was reasonable. Like the search outlined in Rodriguez, GRC 2016-196, the Custodian was required to coordinate with multiple offices to determine the existence of responsive records. This search coincided with several additional factors, including holidays, work schedules, and the complex nature of the request, which required a more thorough search beyond either request in Rodriguez, GRC 2015-312 or Rodriguez, GRC 2016-196. Thus, based on the evidence of record, the GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was not excessive.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on warranted and substantiated extensions. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. See also Rodriguez, GRC 2016-196. 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).

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, GRC 2005-49. In the matter before the Council, the Complainant's OPRA request sought "all documents" between Kean and Gourmet related to capital improvements from 2012 to the date of the OPRA request. Following three (3) extensions, the Custodian responded stating that no records existed. The Custodian subsequently certified to this fact in the SOI and included a description of the search she conducted before arriving at this conclusion. Further, the Complainant did not provide any evidence to contradict this certification. Thus, the GRC is persuaded that the Custodian lawfully denied access to the Complainant's OPRA request.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainants' OPRA request seeking "all documents" regarding capital improvements over a nearly eight (8) year period. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on warranted and substantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018). 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).
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainants' OPRA request seeking "all documents" regarding capital improvements over a nearly eight (8) year period. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

February 16, 2021