



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 26, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-150

v.

Kean University
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council ("Council") considered the September 19, 2017 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 was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian has failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Notably, the Custodian failed to prove that extraordinary circumstances existed here that warranted such a lengthy extension time frame. Thus, the Custodian's request for reconsideration based on extra-ordinary circumstances should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Of its own volition, the Council should rescind conclusion No. 2, which referred this complaint to the Office of Administrative Law for a knowing and willful hearing, based on a mistake. N.J.A.C. 5:105-2.10(a). The Council should reanalyze its knowing and willful issue in light of two (2) mistakes. First, the Council should not include in its consideration whether the Custodian violated N.J.S.A. 47:1A-5(e). Second, the Council should include in its consideration the clarification time frame that it did not consider in its initial analysis.
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by unnecessarily extending the response time by approximately seven (7) months (or 126 business days)



after receiving the Complainant's clarification. Also, the evidence of record indicates that several other Kean employees were involved in this request. Further, the Custodian ultimately disclosed the responsive records to the Complainant on June 6, 2015. Additionally, despite Kean's lack of urgency at responding to the subject OPRA request, 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 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 September, 2017

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: September 29, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting

Luis Rodriguez¹
Complainant

GRC Complaint No. 2015-150

v.

Kean University²
Custodial Agency

Records Relevant to Complaint: For the period from August 2014 to present, any and all documents of any communication between and among Kean University (“Kean”) employees regarding the Kean Fire Safety Training website (<http://www.keanfiresafety.com/>).

Custodian of Record: Laura Haelig

Request Received by Custodian: September 15, 2014

Response Made by Custodian: September 24, 2014; October 10, 2014; November 7, 2014; November 21, 2014; December 5, 2014; December 19, 2014; January 14, 2015; January 28, 2015; February 12, 2015; February 26, 2015; March 12, 2015; March 26, 2015; April 9, 2015; April 23, 2015; May 7, 2015; May 21, 2015; June 4, 2015; June 16, 2015

GRC Complaint Received: May 29, 2015

Background

December 13, 2016 Council Meeting:

At its December 13, 2016 public meeting, the Council considered the 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 did not bear her burden of proof that she timely responded to the Complainant’s September 14, 2014 OPRA request, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. 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 in this instance because the evidence of record

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer L. Cavin.

reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released any responsive records to the Complainant on June 16, 2015.

2. 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) by unnecessarily extending the response time by approximately 9 months and over 170 business days. Also, the evidence of record indicates that several other employees of Kean University were involved in the request. Although the Custodian did ultimately release all responsive records, this complaint should be referred to the Office of Administrative Law for a fact finding hearing and determination of whether the Custodian or any other Kean University official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On December 14, 2016, the Council distributed its Interim Order to all parties. On December 21, 2016, the Custodian's Counsel requested additional time to submit a request for reconsideration. On December 22, 2016, the GRC granted the Custodian's Counsel's request for an extension until January 13, 2017.

On January 13, 2017, the Custodian filed a request for reconsideration of the Council's December 14, 2016 Interim Order based on extraordinary circumstances.

The Custodian argued that the GRC did not consider the significance of probative competent evidence in making its determinations. She contended that the GRC had overlooked that the Complainant's request was overbroad, making it "challenging to process" and difficult to identify and retrieve the requested records. The Custodian argued that extensions of time to respond to requests are acceptable in well-settled GRC decisions. *See* Rivera v. City of Plainfield Police Dep't, GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg, GRC Complaint No. 2010-68 (November 2010); Wener v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012); Rivera v. Union City Bd. of Educ., GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong, GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009). The Custodian noted that while the GRC has found that a custodian cannot exploit the process by seeking continuous extensions by repeatedly rolling over an extension once obtained, the GRC must evaluate when a series of extensions of time to respond to the request crosses the threshold of reasonableness. Ciccarone v. NJ Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, July 29, 2014).

The Custodian argued that there was "not a shred of evidence" in the instant matter to suggest that the Custodian exploited and abused the process. She argued that the GRC relied only upon the "number of extension requests" to conclude that the extensions were unwarranted. The Custodian contended that the GRC failed to consider why the Custodian's extensions were "reasonably necessary." She stated that at the time of the Complainant's request, Kean had approximately 3,000 employees in three (3) geographically distinct campuses. She argued that because the Complainant's request sought such a breadth of documents from unspecified employees, a period of three (3) months was necessary to execute a full search of such a wide

range of information and six (6) months was necessary to review such documents for responsiveness and privileges properly. She noted that she retrieved documents from multiple other officials; the breadth of the search took additional time since she had to rely on, and coordinate with, others to retrieve documents, thereby increasing her burden. She stated that the redaction of certain information was proper under N.J.S.A. 47:1A-1.1, as some of the responsive documents contained specific instructions by the website administrator on how to access administrative parts of the website.

The Custodian reiterated that she had located more than 500 pages of responsive documents on December 12, 2014, and then had to review and redact those documents, which further entailed meeting multiple times with another agency official. She noted that all of the foregoing required additional time, and therefore the extension requests were entirely reasonable and necessary to fulfill the request, which she did on June 16, 2015.

The Custodian further noted that she received nine (9) separate OPRA requests from the Complainant on the same day as the request at issue and that she had additionally processed over 100 other OPRA requests from September 2014 to June 2015 (the time frame in which the request at issue was completed). She noted that she had an overwhelming workload due to the volume of OPRA requests submitted by the Complainant alone, in addition to her other duties and responsibilities. Further, the Custodian asserted that the OPRA request sought “any and all” communications from an undefined set of Kean “employees” regarding a broad subject of a “website.” She further argued that the underlying request here was overbroad, which created additional hardship in identifying responsive documents. She stated that processing the request was difficult and complex due to the overly broad nature of it.

The Custodian argued that because the Council failed to consider the aforementioned evidence, it should reconsider its finding that her unsubstantiated extensions violated OPRA. Further, the Custodian asserted that the Council should reconsider sending this matter to the Office of Administrative Law (“OAL”) for a fact-finding hearing and determination on the knowing and willful issue. She argued that the Council failed to appreciate “significant probative evidence” demonstrating why the extensions of this particular request were reasonably necessary. Further, the Custodian contended that the record establishes “*on its face*” that neither she nor any Kean employee knowingly and willfully violated OPRA (emphasis in original). The Custodian finally asserted that the Council also errantly determined that she may have knowingly and willfully violated OPRA by violating N.J.S.A. 47:1A-5(e). The Custodian noted that no immediate access records were at issue in this complaint; thus, she could not have violated the “immediate access” provision of OPRA.

On January 24, 2017, the Complainant sought a five (5) business day extension of time to submit objections to the request for reconsideration, which the GRC granted that same day.

On January 25, 2017, the Complainant submitted objections to the request for reconsideration. The Complainant argued that the Custodian’s description of “extraordinary circumstances” differed from how the GRC typically considered that term. He noted that in Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (May 2013), the GRC cited Hurricane Irene as the extraordinary circumstance justifying a Custodian’s extension in replying

to an OPRA request. Conversely, the Complainant noted that in Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (July 2012), the Council determined that the custodian's vacation did not constitute "extraordinary circumstances" warranting a reconsideration. Id. at 7.

The Complainant argued that the Custodian's request for reconsideration actually asserted that the Council made a "mistake." The Complainant requested that the GRC not consider the Custodian's filing because it used the "incorrect rationale" and checked the wrong box on the reconsideration form.

Moreover, the Complainant argued that Kean was providing misleading statements to justify its "extraordinary circumstances" defense. The Complainant first contended that the Custodian failed to prove in her Statement of Information ("SOI") that his OPRA request was difficult to process. He further argued that the Custodian's argument – that the request itself was overbroad – ignored his actions in clarifying his original OPRA request, which the GRC noted in its decision, when it stated that the Complainant sent a clarification letter limiting the correspondence sought to certain individuals.

Next, the Complainant argued that the Custodian provided the total number of pages disclosed to mislead the GRC. The Complainant argued that of the 435 pages disclosed, 217 of them were publically available. The Complainant asserted that the Custodian did not need to review and/or redact any of these pages. He further disputed the Custodian's description of the redaction process as particularly difficult or time consuming, as the remaining material consisted primarily of e-mail threads that repeated subject lines throughout. The Complainant also contended that the Custodian failed to prove that the redactions for computer security and personal privacy were somehow complex. The Complainant asserted that the redactions were minimal and clearly did not require six (6) months.³

The Complainant argued that the Council did consider the totality of circumstances, not just the sole number of extensions requested by the Custodian. He further argued that the Custodian has an assistant to assist with OPRA requests, which belies the Custodian's argument that she was overburdened during the pendency of the subject OPRA request.

Finally, the Complainant contended that the GRC should consider that the Custodian only disclosed the responsive records at the time that she submitted the SOI, which is "highly suspicious." The Complainant noted that he has filed other complaints in which the GRC determined that Kean violated OPRA's timeliness provisions. The Complainant asserted that Kean never sought reconsideration, even in circumstances where the response time was less

³ The Complainant questioned whether the Custodian lawfully redacted individuals' names from vendors working with the State in the disclosed e-mails under the privacy provision. The Complainant requested that the GRC ask the OAL to review the responsive e-mails to determine whether the redactions were reasonable. However, the Complainant did not raise this issue until he addressed his reconsideration objections. Moreover, the Complainant did not file his own request for reconsideration. In the absence of a valid or timely request for reconsideration from the Complainant, the GRC declines to review this issue.

reasonable then it was here. The Complainant argued that had the GRC considered every violation Kean committed, it would have already found a knowing and willful violation.⁴

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Order dated December 14, 2016, on January 13, 2017, within the extended time frame granted by the GRC.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Additionally, pursuant to N.J.A.C. 5:105-2.10(a), the Council may reconsider any decision it renders, at its own discretion. Id.; Scheeler, Jr. v. NJ State Police, GRC Complaint No. 2014-57, *et seq.* (December 2014).

Here, in support of her request for reconsideration, the Custodian repeatedly contended that the Council failed to consider the “extraordinary circumstances” of the underlying OPRA

⁴ The Complainant made an additional allegation concerning a past, unrelated violation of the Open Public Meetings Act (“OPMA”). The GRC declines to consider the argument because the GRC has no jurisdiction over OPMA. N.J.S.A. 47:1A-7.

request. She argued that the Council overlooked that the Complainant's request was overbroad, making it "challenging to process" and making it difficult to identify and retrieve the requested records. She argued that no evidence existed to suggest that the Custodian had exploited the extension process and that the Council relied only upon the number of extension requests to conclude that the extensions were unwarranted. The Custodian argued that because the Complainant's request sought such a breadth of documents from unspecified employees, three (3) months was necessary to execute a full search of such a wide range of information and six (6) months was necessary to review such documents for responsiveness and privileges. She noted that documents were retrieved from multiple other officials, and the scope of the search took additional time since she had to coordinate with multiple people.

The Custodian further noted that she received nine (9) separate OPRA requests from the Complainant on the same day as the request at issue and additionally processed over 100 other dispositions from September 2014 to June 2015 (the time frame in which the instant request was completed). She noted that she had an overwhelming workload due to the volume of OPRA requests submitted by the Complainant alone, in addition to her other duties and responsibilities. She argued that the GRC failed to appreciate "significant probative evidence" demonstrating why the extensions of this particular request were reasonably necessary.

The Complainant conversely alleged that the Custodian insinuated that the Council made a mistake and that no extraordinary circumstances exist (*citing Kohn*, GRC 2011-326 & *Colasante*, GRC 2010-18). The Complainant also argued that the Custodian provided misleading statements aimed at justifying her actions. The Complainant asserted that the Council took into account all arguments of the parties prior to making its determination; thus, no reconsideration is warranted. The Complainant then took issue with some of the redactions present in the disclosed records.

Initially, the Council should reject the Custodian's request for reconsideration based on extraordinary circumstances. The Council considered all of the Custodian's arguments in the initial decision and concluded that the extensions were unsubstantiated and unwarranted. Similar to its decision in *Colasante*, GRC 2010-18, the GRC does not find here that the Custodian proved that extraordinary circumstances existed to warrant such a lengthy extension of time.

However, for the following reasons, the GRC will reconsider conclusion No. 2 of its own volition in order to amend the Council's December 13, 2016 Interim Order.

First, the Custodian raised one point that appears to be a mistake. The Custodian noted that no "immediate access" records were at issue here; thus, she could not have committed a violation under N.J.S.A. 47:1A-5(e). The GRC agrees that the Council's citation in this instance is misplaced in conclusion No. 2 of the Council's Order.

Second, the Council mistakenly failed to consider the significance of the Complainant's November 7, 2014 clarification and how it has traditionally viewed how they affect response time frames. Specifically, should a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew, thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request.

N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012)(holding that the custodian's failure to respond within the new time frame following receipt of clarification resulted in a "deemed" denial of access); Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015). Thus, while the overarching time frame here was nine (9) months, the Council should have taken into account the time period between the clarification and the final response, which spanned only seven (7) months.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian has failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D'Atria, 242 N.J. Super. at 401. Notably, the Custodian failed to prove that extraordinary circumstances existed here that warranted such a lengthy extension time frame. Thus, the Custodian's request for reconsideration based on extra-ordinary circumstances should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, the GRC is persuaded that the Council should reconsider conclusion No. 2 and determine that no knowing and willful violation occurred. First, the Council mistakenly held that the Complainant violated N.J.S.A. 47:1A-5(e); no immediate access records were at issue here. Further, in calculating the response time frame from the clarification date, a seven (7) month gap in response is certainly less egregious than nine (9) months. The calculation of the overall number of business days in extensions is decidedly less when applying the clarification and restarting of the statutory time frame. Instead of the 170 business days the Council originally weighed its decision on, the extension time frame is actually less forty-four (44) business days (loosely accounting for holidays). This calculation does not include the initial seven (7) business days after the clarification once the time frame began anew. Thus, the total number of business days expended during the extended time frame was 126 business days (loosely accounting for holidays). The GRC finds that the shortened time frame does not carry the same significance to warrant a hearing before the OAL

Accordingly, of its own volition, the Council should rescind conclusion No. 2, which referred this complaint to OAL for a knowing and willful hearing, based on a mistake. N.J.A.C. 5:105-2.10(a). The Council should reanalyze its knowing and willful issue in light of two (2) mistakes. First, the Council should not include in its consideration whether the Custodian violated N.J.S.A. 47:1A-5(e). Second, the Council should include in its consideration the clarification time frame that it did not consider in its initial analysis.

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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by unnecessarily extending the response time by approximately seven (7) months (or 126 business days) after receiving the Complainant’s clarification. Also, the evidence of record indicates that several other Kean employees were involved in this request. Further, the Custodian ultimately disclosed the responsive records to the Complainant on June 6, 2015. Additionally, despite Kean’s lack of urgency at responding to the subject OPRA request, 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 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 was required to establish either of the necessary criteria set forth above: either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian has failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See* D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Notably, the Custodian failed to prove that extraordinary circumstances existed here that warranted such a lengthy extension time frame. Thus, the Custodian’s request for reconsideration based on extra-ordinary

circumstances should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Of its own volition, the Council should rescind conclusion No. 2, which referred this complaint to the Office of Administrative Law for a knowing and willful hearing, based on a mistake. N.J.A.C. 5:105-2.10(a). The Council should reanalyze its knowing and willful issue in light of two (2) mistakes. First, the Council should not include in its consideration whether the Custodian violated N.J.S.A. 47:1A-5(e). Second, the Council should include in its consideration the clarification time frame that it did not consider in its initial analysis.
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by unnecessarily extending the response time by approximately seven (7) months (or 126 business days) after receiving the Complainant's clarification. Also, the evidence of record indicates that several other Kean employees were involved in this request. Further, the Custodian ultimately disclosed the responsive records to the Complainant on June 6, 2015. Additionally, despite Kean's lack of urgency at responding to the subject OPRA request, 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

September 19, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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TRENTON, NJ 08625-0819

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INTERIM ORDER

December 13, 2016 Government Records Council Meeting

Luis Rodriguez
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Complaint No. 2015-150

v.

Kean University
Custodian of Record

At the December 13, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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 September 14, 2014 OPRA request, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. 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 in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released any responsive records to the Complainant on June 16, 2015.
2. 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) by unnecessarily extending the response time by approximately 9 months and over 170 business days. Also, the evidence of record indicates that several other employees of Kean University were involved in the request. Although the Custodian did ultimately release all responsive records, this complaint should be referred to the Office of Administrative Law for a fact finding hearing and determination of whether the Custodian or any other Kean University official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 13th Day of December, 2016

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 14, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2016 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2015-150

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: For the period from August 2014 to present, any and all documents of any communication between and among Kean University (“Kean”) employees regarding the Kean Fire Safety Training website (<http://www.keanfiresafety.com/>).

Custodian of Record: Laura Haelig

Request Received by Custodian: September 15, 2014

Response Made by Custodian: September 24, 2014; October 10, 2014; November 7, 2014; November 21, 2014; December 5, 2014; December 19, 2014; January 14, 2015; January 28, 2015; February 12, 2015; February 26, 2015; March 12, 2015; March 26, 2015; April 9, 2015; April 23, 2015; May 7, 2015; May 21, 2015; June 4, 2015; June 16, 2015

GRC Complaint Received: May 29, 2015

Background³

Request and Response:

On September 14, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 24, 2014, the Custodian responded in writing, advising that the request required an extension of time until October 10, 2014 to “be appropriately processed.” The Custodian noted that OPRA allows custodians to seek extensions of time pursuant to N.J.S.A. 47:1A-5(i).

On October 10, 2014, the Custodian wrote to the Complainant, advising that the request required an additional extension of time, until October 24, 2014, to be appropriately processed. On October 24, 2014, the Custodian again wrote to the Complainant, reiterating her earlier letter and extending the response time to November 7, 2014. On November 3, 2014, the Complainant sent a clarification letter, seeking correspondence with Richard M. Loalbo and the following

¹No legal representation listed on record.

²Represented by Deputy Attorney General Angela L. Velez.

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.

individuals: any and/or all employees of the Kean unit that work with the NJ Division of Fire Safety on training, Audrey Kelly or any of her subordinates, Laura Haelig, Phil Connelly, and Dawood Farahi.

On November 7, 2014, the Custodian again wrote to the Complainant, reiterating her earlier letter and extending the response time to November 21, 2014. On November 21, 2014, the Custodian again wrote to the Complainant, reiterating her earlier letter and extending the response time to December 5, 2014. On December 5, 2014, the Custodian again wrote to the Complainant, reiterating her earlier letter and extending the response time to December 19, 2014.

On December 19, 2014, the Custodian again wrote to the Complainant, extending the response time to January 14, 2015 as “the documents are currently under review for redactions” and due to the University’s pending closure “for Holiday break.” On January 14, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to January 28, 2015. On January 28, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to February 12, 2015. On February 12, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to February 26, 2015.

On February 26, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to March 12, 2015. On March 12, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to March 26, 2015. On March 26, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to April 9, 2015. On April 9, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to April 23, 2015.

On April 23, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to May 7, 2015. On May 7, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to May 21, 2015. On May 21, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to June 4, 2015. On June 4, 2015, the Custodian again wrote to the Complainant, reiterating her previous letter and extending the response time to June 18, 2015.

On June 16, 2015, the Custodian responded in writing with a “final disposition” as to the Complainant’s September 15, 2014 OPRA request, noting that records responsive to the request totaled 435 pages. The Custodian further advised that the records were redacted pursuant to N.J.S.A. 47:1A-1.1(8) and N.J.S.A. 47:1A-1, and were being provided via e-mail attachment.

Denial of Access Complaint:

On May 28, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that “the clarification was due to a GRC decision on another OPRA request.” The Complainant surmised that “presumably, the decision to review for redaction was made before January 14, 2015” and asserted that as of the

filing of his complaint, he had not received responsive documents from the University. He noted that the University “has been reviewing for redactions the documents related to this request for four months” and argued that the delay was unreasonable. The Complainant argued that the University’s delay was a violation of OPRA. The Complainant made no additional legal arguments.

Statement of Information:

On June 16, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 24, 2014. The Custodian certified that she responded in writing, seeking several extensions of time, specifically on October 10, 2014; October 24, 2014; November 7, 2014; November 21, 2014; December 5, 2014; December 19, 2014; January 14, 2015; January 28, 2015; February 12, 2015; February 26, 2015; March 12, 2015; March 26, 2015; April 9, 2015; April 23, 2015; May 7, 2015; May 21, 2015; and June 4, 2015. She additionally certified that she responded in writing, providing the responsive records, on June 16, 2015. She advised that the responsive records had portions redacted to exempt administrative or technical information regarding computer hardware, software, and networks, and other portions redacted due to privacy concerns. N.J.S.A. 47:1A-1.1(8); N.J.S.A. 47:1A-1.1(24).

The Custodian stated that, on the same day she received the OPRA request at issue, she received from the Complainant nine additional requests on related subject matter. She stated that the ten (10) requests were forwarded to Audrey Kelly, George Thorn, Karen Grant (Director of the Kean Fire Safety Training Program), and Jessica Bances in order to retrieve responsive documents from the appropriate offices. She stated that after the September 24, 2014 extension letter was sent to the Complainant, Karen Grant “confirmed via phone” that she and her employees would identify correspondence based on the request that is the subject of the complaint. She certified that Ms. Grant advised her that the correspondence would require redactions for computer security and privacy purposes. The Custodian certified that “additional extension letters were forwarded” to the Complainant via e-mail from October to early December 2014, “as the identified correspondence was compiled.”

She certified that Ms. Grant hand delivered “correspondence totaling more than 500 pages” to the Office of Human Resources on December 12, 2014. The Custodian stated that proposed redactions had been made and required review in accordance with specific OPRA exemptions. She stated that extension letters were then sent to the Complainant via e-mail from December 19, 2014 to June 4, 2015 as the documents were reviewed and redactions were completed.

The Custodian certified that, following a series of meetings to review the documents and upon completion of the appropriate redactions, she sent a disposition letter and 435 pages of responsive records to the Complainant via e-mail. Additionally, “to provide additional perspective,” the Custodian added that the Complainant submitted over 100 OPRA requests in 2014 and more than 90 requests from January 1, 2015, to the time of the SOI.

The Custodian additionally argued that because she had provided the Complainant with the requested records, the request was complete. She argued that her response was timely because the Complainant's request was "overbroad" due to seeking correspondence between unspecified employees. She averred that the documents provided were properly redacted pursuant to N.J.S.A. 47:1A-1.1 (administrative or technical information regarding computer hardware, software and networks, which, if disclosed, would jeopardize computer security) and N.J.S.A. 47:1A-1, to protect a privacy interest. She further certified that the redactions consist of "specific instructions by the website administrator on how to access administrative parts of the website" and the private e-mail addresses of both Mr. Loalbo and a Kean employee. She noted that identifying information provided by a firefighter using the website for technical support was also redacted.

She further argued that while OPRA requires a custodian to grant access or deny a request not later than seven business days after receipt of the request, the law included exceptions to that general rule reflecting "the Legislature's intention to balance the requestor's interest in prompt access to identifiable records and the operational needs of government." NJ Builders Ass'n v. NJ Council on Affordable Housing, 300 N.J. Super. 166, 180 (2007). She further argued that these exceptions rely on reasonableness and include considerations such as when the record is not available, the records is in storage or archived, or "if a request for access to a government record would substantially disrupt agency operations." N.J.S.A. 47:1A-5(i).

She argued that the Complainant's request sought a breadth of documents from unspecified employees, thereby justifying the three months necessary to execute a search and "six months . . . to properly review such documents for responsiveness and privileges." The Custodian additionally contended that the Complainant's request was overly broad, as it requested "any and/or all" records and failed to identify the employees from which correspondence was requested. She stated that her office's workload to "make a determination on responsiveness and privileged information" further illustrated the lack of specificity in the underlying request. She also argued that she continually advised the Complainant that she was working on his request and required additional time to provide a response. She argued, therefore, that because of the aforementioned factors, the amount of time taken to respond was reasonable and that the Complainant now has all responsive documents.

Additional Submissions:

On June 18, 2015, the Complainant wrote to the GRC in response to the Custodian's SOI. He stated that the central issue in his complaint was that "six months is much too long for Kean to take in reviewing these documents for redaction." He disputed the Custodian's characterization of the 435 pages of responsive documents as a "massive amount of documents [that] needed to be reviewed for redaction." He called this characterization "misleading" and stated that 216 of the 435 pages provided to him are copies of material related to the courses offered by the Kean Fire Safety Training Program (KFTP). The Complainant argued that these materials were produced to be made available to the public and therefore did not require any review for redaction.

Although the Custodian did not provide the GRC with a copy of the documents provided to the Complainant, the Complainant attached the .pdf file containing said documents to his submission. He argued that “a smidgen more than half” of the responsive documents consist of “pages from catalogs, course listings, etc.” He argued that the remaining 217 pages, which consist of e-mail correspondence, contained primarily “short” e-mails, which “means the person(s) reviewing those e-mails for redactions did not have to read an entire page of text.”

The Complainant additionally argued that the majority of the e-mails consisted of “e-mail threads,” containing previous e-mails, which he suggested could significantly reduce the number of pages a redactor had to review. He argued that the Custodian’s use of page numbers in the SOI “distort[ed] the amount of time it took to review the documents for redaction” and the use of large numbers misleads the reader. The Complainant thereafter requested that the GRC “ignore this section of Kean’s SOI.”

The Complainant also disputed the Custodian’s Counsel’s reliance on NJ Builders Ass’n v. NJ Council on Affordable Housing, 300 N.J. Super. 166, 180 (2007), contending that the Council on Affordable Housing took only ten (10) days to provide responsive documents to “thirty-seven unclearly worded requests from the Builder’s Association.” Finally, the Complainant disputed the Custodian’s assertions as to the frequency of his OPRA requests and asked the GRC to find that the Custodian had knowingly and willfully violated OPRA.

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.

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 provide 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 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. 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. NJ 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. NJ 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. NJ 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 multiple extensions for the Complainant’s September 14, 2014 OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
September 24, 2014	October 10, 2014	So that the OPRA request may “be appropriately processed.”
October 10, 2014	October 24, 2014	So that the OPRA request may “be appropriately processed.”
October 24, 2014	November 7, 2014	So that the OPRA request may “be appropriately processed.”
November 7, 2014	November 21, 2014	So that the OPRA request may “be appropriately processed.”
November 21, 2014	December 5, 2014	So that the OPRA request may “be appropriately processed.”
December 5, 2014	December 19, 2014	So that the OPRA request may “be appropriately processed.”
December 19, 2014	January 14, 2015	The “documents are currently under review for redactions” and due to the University’s pending closure for holiday break.
January 14, 2015	January 28, 2015	The “documents are currently under review for redactions.”
January 28, 2015	February 12, 2015	The “documents are currently under review for redactions”
February 12, 2015	February 26, 2015	The “documents are currently under review for redactions”
February 26, 2015	March 12, 2015	The “documents are currently under review for redactions”
March 12, 2015	March 26, 2015	The “documents are currently under review for redactions”
March 26, 2015	April 9, 2015	The “documents are currently under review for redactions”
April 9, 2015	April 23, 2015	The “documents are currently under review for redactions”
April 23, 2015	May 7, 2015	The “documents are currently under review for redactions”
May 7, 2015	May 21, 2015	The “documents are currently under review for redactions”
May 21, 2015	June 4, 2015	The “documents are currently under review for redactions”
June 4, 2015	June 18, 2015	The “documents are currently under review for redactions”

The subject OPRA request sought communications between and among Kean University employees regarding the Kean Fire Safety Training website, during a one-month period, later

clarified to specify correspondence with Richard M. Loalbo and several other individuals. The Custodian extended the response time on eighteen (18) occasions for a total exceeding 170 business days (loosely accounting for holidays). As noted above, a requestor's approval is not required for a valid extension. However, 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.⁴

The evidence of record indicates that, based on the nature of the OPRA request, the Custodian was working with other individuals to respond to the request. The Custodian's certification regarding the search indicated that extension letters were sent to the Complainant "as the identified correspondence was compiled," until December 5, 2014. Following that date, the Custodian certified that she was in receipt of the responsive documents "totaling more than 500 pages." Extension requests were sent to the Complainant from December 19, 2014, through June 4, 2015, as the documents were reviewed and redactions were completed. The Custodian certified that she had a series of meetings to review the documents with Karen Grant over this time period, before the 435 pages of responsive correspondence was finally provided to the Complainant on June 6, 2015.

Upon review, the GRC finds the Custodian's repeated requests for extension extreme and unwarranted. Based on the facts of the instant matter, the GRC does not find 170 business days reasonable to review and redact 435 pages of material that includes a considerable amount of repeated content. In the instant matter, the GRC finds that the Custodian's extension of time, to the extent demonstrated, was clearly excessive and flies in the face of OPRA's mandate to "promptly comply" with a records request and to grant or deny access "as soon as possible . . ." N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the Complainant's September 14, 2014 OPRA request, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. 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 in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on June 16, 2015.

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*.

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)).

In the instant matter, 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) by unnecessarily extending the response time by approximately 9 months and over 170 business days. Also, the evidence of record indicates that several other employees of Kean were involved in the request. Although the Custodian did ultimately release all responsive records, this complaint should be referred to the Office of Administrative Law for a fact finding hearing and determination of whether the Custodian or any other Kean official knowingly and willfully violated OPRA and unreasonably denied 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 September 14, 2014 OPRA request, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. 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 in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released any responsive records to the Complainant on June 16, 2015.

2. 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) by unnecessarily extending the response time by approximately 9 months and over 170 business days. Also, the evidence of record indicates that several other employees of Kean University were involved in the request. Although the Custodian did ultimately release all responsive records, this complaint should be referred to the Office of Administrative Law for a fact finding hearing and determination of whether the Custodian or any other Kean University official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Husna Kazmir
Staff Attorney

December 6, 2016⁵

⁵ The complaint was prepared for adjudication at the Council's September 29, 2016 meeting; however, legal counsel needed more time to review the matter and asked that the item be tabled.