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CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**September 29, 2016 Government Records Council Meeting**

Luis F. Rodriguez  
Complainant

v.

Kean University  
Custodian of Record

Complaint No. 2015-209

At the September 29, 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. Kean University’s initial failure to locate the responsive contracts and disclose them to the Complainant constitutes an insufficient search. Schneble v. NJ Dep’t of Env’tl. Prot., GRC Complaint 2007-220 (April 2008). Thus, the Custodian unlawfully denied access to at least the responsive 2010 and 2011 contracts. N.J.S.A. 47:1A-6; Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011). However, the GRC need not order disclosure of the 2010 and 2011 contract because the Custodian disclosed them to the Complainant on August 6, 2016.
2. The Custodian did not unlawfully deny access to the responsive 2012 contract because the Complainant already possessed the contract at issue at the time that he submitted his March 30, 2015 OPRA request. Additionally, requiring the Custodian to duplicate another copy of the 2012 contract for the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *See* Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006); Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. District (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013).
3. The search that several Kean officials performed was insufficient; however, the Custodian did not unlawfully deny access to the responsive 2012 contract because the Complainant already possessed same at the time that he submitted the subject OPRA request. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006); Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. District (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013). Additionally, the evidence of record does not indicate that the insufficient search had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, no individual’s actions, including those of the Custodian, rose 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 29<sup>th</sup> Day of September, 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: October 4, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2016 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-209**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of “any and all” contracts between Kean University (“Kean”) and the County of Union (“County”) to provide information technology (“IT”), data processing, and/or telecommunications services to the County between 2010 and 2012.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** March 30, 2015  
**Response Made by Custodian:** April 9, 2015  
**GRC Complaint Received:** July 13, 2015

**Background<sup>3</sup>**

**Request and Response:**

On March 29, 2015, a Sunday, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 9, 2015, the Custodian responded in writing, advising that an extension until April 23, 2015, would be necessary to process the request.

On April 23, 2015, the Custodian responded in writing, advising that an extension until May 7, 2015, would be necessary. On May 7, 2015, the Custodian responded in writing, seeking an extension until May 21, 2015. On May 21, 2015, the Custodian responded in writing, advising that an extension until June 4, 2015, would be necessary. On June 4, 2015, the Custodian responded in writing, seeking an extension until June 11, 2015. On June 11, 2015, the Custodian responded in writing, advising that an extension until June 25, 2015, would be necessary. On June 25, 2015, the Custodian responded in writing, seeking an extension until July 9, 2015. On

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

<sup>3</sup> 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.

July 9, 2015, the Custodian responded in writing, denying the Complainant's OPRA request because no responsive records exist.

#### Denial of Access Complaint:

On July 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian unlawfully denied him access to responsive records. The Complainant included in his Denial of Access Complaint an excerpt from a 2012 contract wherein Kean agreed to provide data processing and telecommunications services to the County. The Complainant contended that the Custodian denied access to this record.

#### Supplemental Response:

On August 6, 2015, the Custodian responded in writing to the Complainant, advising that twenty-four (24) pages of records responsive to the Complainant's OPRA request were located. The Custodian stated that she sent the responsive records via e-mail at no cost.

#### Statement of Information:

On August 6, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on March 30, 2015. The Custodian certified that her search included forwarding the request to Felice Vazquez, Associate Vice President and Special Counsel. The Custodian certified that she also forwarded the request (along with four (4) other requests on the same subject matter) to George Thorn, Director of University Purchasing. The Custodian affirmed that Ms. Vazquez sought multiple extensions to facilitate a thorough search of Kean's files, which included contacting all related internal and external offices. The Custodian certified that on July 8, 2015, she received contracts responsive to one of the four (4) other requests and asked Ms. Vazquez whether she located any contracts responsive to the subject OPRA request. The Custodian affirmed that Ms. Vazquez confirmed on July 9, 2015 that she did not locate any responsive records. The Custodian certified that she responded in writing on the same day, advising the Complainant that no records existed.

The Custodian affirmed that, upon receipt of the instant Denial of Access Complaint, she forwarded it to Ms. Vasquez. The Custodian certified that Kean utilized the screenshot included in the complaint to aid several offices in narrowing their search for responsive records. The Custodian certified that Kean was able to identify responsive records based on the screenshot, which she provided to the Complainant electronically on August 6, 2015.

The Custodian contended that she lawfully denied access to the responsive records because the Complainant clearly possessed them. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008)(citing Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 34, 38 (App. Div. 2005). See also Gordon v. City of Orange, 2015 N.J. Super. Unpub. LEXIS 1773, 6 (App. Div. 2015); L.R. v. Camden Bd. of Educ., 2012 N.J. Super. Unpub LEXIS 1140, 6-7 (App. Div. 2012). The Custodian asserted that OPRA does not require a custodian to duplicate copies of a record already in the requestor's possession. See Bart, 403 N.J. Super. at 618.

Moreover, the Custodian asserted that, should the GRC find that she unlawfully denied access to any records, such a denial was not knowing and willful. The Custodian asserted that the facts support that the Custodian undertook an extensive, good faith search for responsive records. The Custodian averred that she undertook a second extensive search after the Complainant provided a portion of one of the responsive contracts as part of his Denial of Access Complaint. The Custodian argued that her inability to locate the apparently misplaced records do not rise to the level of a knowing and willful violation of OPRA. *See Gordon, 2015 N.J. Super.* at 6. The Custodian further noted that OPRA's purpose of ensuring an informed citizenry was already achieved because the Complainant possessed the responsive record. The Custodian finally noted that she located the responsive record and disclosed it to the Complainant.

#### Additional Submissions:

On August 9, 2016, the GRC sought additional information from the Complainant. Specifically, the GRC stated that it was unclear whether the Complainant possessed the responsive records prior to submitting the subject OPRA request. Based on the foregoing, the GRC requested that the Complainant submit a legal certification responding to the following:

1. Did the Complainant possess the 2012 contract at the time of the subject OPRA request, a screen shot of which he provided as part of the Denial of Access Complaint?
2. Did the Complainant possess any of the other responsive contracts at the time of the subject OPRA request, and if so, how and when did he come into possession of them?

The GRC required the Complainant to submit his legal certification by close of business on August 12, 2016.

On August 16, 2016, following a short extension of time, the Complainant submitted his response to the GRC's request for additional information. In response to question No. 1, the Complainant certified that he possessed the responsive 2012 contract at the time that he submitted the subject OPRA request. The Complainant certified that he received the 2012 contract from the County on March 9, 2012. In response to question No. 2, the Complainant alleged that he was confused because Kean only provided the 2012 contract. Thus, the Complainant sought clarification prior to responding to the question.

On August 23, 2016, the GRC e-mailed the Complainant, stating that it posed question No. 2 based on its understanding that the Custodian certified in the SOI that she provided contracts for 2010, 2011, and 2012. However, the GRC advised that it would seek additional information from the Custodian on this point.

On August 26, 2016, the GRC sought additional information from the Custodian. Specifically, the GRC stated that the Complainant previously alleged that the Custodian only disclosed one contract from 2012. However, the GRC stated that the SOI suggested that the Custodian disclosed contracts for all three years. Based on the foregoing, the GRC requested that the Custodian submit a legal certification responding to the following:

1. Did the Custodian only disclose one contract for the year 2012 in response to the Complainant's OPRA request?
2. If so, do the remaining requested contracts for 2010 and 2011 exist?

The GRC required the Custodian to submit his legal certification by close of business on August 31, 2016.

On August 31, 2016, the Custodian responded to the GRC's request for additional information. Therein, the Custodian certified that contracts for 2010 and 2011 did exist. Further, the Custodian certified that she provided the Complainant both contracts on August 6, 2015.

On September 14, 2016, the GRC e-mailed the Complainant, requesting that he complete his August 16, 2016 certification to answer whether he possessed the 2010 and 2011 contracts at the time of his OPRA request. The GRC required the Complainant to submit his certification by close of business on September 16, 2016.

On September 16, 2016, the Complainant responded to the GRC's request to complete his August 16, 2016 certification. Therein, the Complainant certified that he did not possess the 2010 and 2011 contracts prior to his OPRA request. The Complainant certified that the County only provided him with the 2012 contract, which he received on March 9, 2015.

## Analysis

### Insufficient Search

#### 2010 and 2011 contracts

A custodian is obligated to search for and find identifiable government records listed in an OPRA request. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); May v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007); Schneble v. NJ Dep't of Env'tl. Prot., GRC Complaint 2007-220 (April 2008). Further, "it is among a custodian's duties to perform a complete search for the requested records before responding to an OPRA request as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law." Weiner v. Cnty. of Essex, GRC Complaint No. 2013-220 (March 2014) at 3.

In Schneble, GRC 2007-220, the custodian initially responded to the complainant's OPRA request, stating that no records responsive existed. The complainant, however, submitted as part of the Denial of Access Complaint e-mails that were responsive to her request. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through New Jersey Department of Environmental Protection files and this time located responsive records. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied access to the requested records.

Moreover, in Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), the Council held that the custodian denied access as a result of an

initially inadequate search pursuant to complainant's OPRA request and failed to bear the burden of proving due diligence in searching for the records. Specifically, the complainant submitted two (2) OPRA requests, one year apart, for the same records. The custodian initially responded that no records existed. However, the custodian conducted a search one year after the initial search and located the records in the same area, within an office that she admitted having searched a year earlier.

Here, the Complainant sought access to certain contracts between Kean and the County for IT services over a three (3) year period. The Custodian initially responded that no records existed. Thereafter, the Complainant filed the instant complaint and included a screenshot of one of the responsive contracts. The Custodian certified in the SOI that Ms. Vasquez performed a search and replied that no records existed. However, the Custodian then certified that, upon receipt of the Denial of Access Complaint inclusive of the 2012 contract screenshot, officials within Kean were able to locate all three (3) contracts and provide same on August 6, 2016.

The Council's decision in Schneble, GRC 2007-220, is applicable here. Specifically, the Custodian caused Ms. Vasquez to perform a search and sought three (3) months of extensions to facilitate same. After the Custodian responded that no records existed, the Complainant filed this complaint, which included a screenshot of one of the responsive contracts. Thereafter, as in Schneble, the Custodian, Ms. Vasquez, and/or other unidentified officials within Kean were able to locate and disclose the responsive contracts to the Complainant. The evidence also supports that the insufficient search does not rest with the Custodian alone, as other individuals including Ms. Vasquez, were involved in performing a search to locate responsive records.

Accordingly, Kean's initial failure to locate the responsive contracts and disclose them to the Complainant constitutes an insufficient search. Schneble, GRC 2007-220. Thus, the Custodian unlawfully denied access to at least the responsive 2010 and 2011 contracts. N.J.S.A. 47:1A-6; Lebbing, GRC 2009-251. However, the GRC need not order disclosure of the 2010 and 2011 contract because the Custodian disclosed them to the Complainant on August 6, 2016.

### **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.

#### **2012 contract**

In Bart, 403 N.J. Super. 609, the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Id. at 617. The Court further noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id.

The Court's decision in Bart, 403 N.J. Super. 609 (App. Div 2008), however, turns upon the facts of that case. In the adjudication of the Denial of Access Complaint, the Council's decision noted the certification of the custodian that copies of the requested record were available at the Housing Authority's front desk upon a simple verbal request by any member of the public. Moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006).

Additionally, in Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. District (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013), the complainant sought access to student discipline reports. The custodian's counsel responded, indicating that he provided the records in response to a prior OPRA request. The Council held that:

The Custodian did not unlawfully deny access to the records responsive to request item no. 8 because at the time of the Complainant's December 14, 2012 OPRA request, the Complainant had already been provided with full access to the requested records in both hard copy and in electronic format. Thus, requiring the Custodian to duplicate another copy of the requested records and send them to the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry, pursuant to [Bart, 403 N.J. Super. 609].

Id.

Here, the Complainant argued that Kean violated OPRA in failing to provide him with at least the responsive 2012 contract. However, upon filing the instant Denial of Access Complaint, the Complainant included a screenshot of the 2012 contract as proof to refute the Custodian's response that no records existed. The Complainant subsequently certified on August 16, 2016, that he received the 2012 contract from the County on March 9, 2015; nearly a month before he submitted the subject OPRA request seeking access to the same contract from Kean. Bart, *supra*, controls the instant case. Thus, it follows that the Custodian could not have unlawfully denied access to the 2012 contract.

Therefore, the Custodian did not unlawfully deny access to the responsive 2012 contract because the Complainant already possessed the contract at issue at the time that he submitted his March 30, 2015 OPRA request. Additionally, requiring the Custodian to duplicate another copy of the 2012 contract for the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *See* Bart, 403 N.J. Super. 617; Owoh, GRC 2012-330.

### **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 search that several Kean officials performed was insufficient; however, the Custodian did not unlawfully deny access to the responsive 2012 contract because the Complainant already possessed same at the time that he submitted the subject OPRA request. Bart, 403 N.J. Super. 617; Owoh, GRC 2012-330. Additionally, the evidence of record does not indicate that the insufficient search had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, no individual’s actions, including those of the Custodian, rose 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. Kean University’s initial failure to locate the responsive contracts and disclose them to the Complainant constitutes an insufficient search. Schneble v. NJ Dep’t of Env’tl. Prot., GRC Complaint 2007-220 (April 2008). Thus, the Custodian unlawfully denied access to at least the responsive 2010 and 2011 contracts. N.J.S.A. 47:1A-6; Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011). However, the GRC need not order disclosure of the 2010 and 2011 contract because the Custodian disclosed them to the Complainant on August 6, 2016.
2. The Custodian did not unlawfully deny access to the responsive 2012 contract because the Complainant already possessed the contract at issue at the time that he submitted his March 30, 2015 OPRA request. Additionally, requiring the Custodian to duplicate another copy of the 2012 contract for the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *See* Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006); Owoh (on behalf

of O.R.) v. West Windsor-Plainsboro Reg'l Sch. District (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013).

3. The search that several Kean officials performed was insufficient; however, the Custodian did not unlawfully deny access to the responsive 2012 contract because the Complainant already possessed same at the time that he submitted the subject OPRA request. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006); Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. District (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013). Additionally, the evidence of record does not indicate that the insufficient search had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, no individual's actions, including those of the Custodian, rose 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 22, 2016