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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

March 28, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2015-312

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 2017 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 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant’s August 2, 2015 OPRA request not seeking “immediate access” records, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. However, the violation largely rests with Ms. Vazquez, the point of delay for over a month of business days. Therefore, Ms. Vazquez’s delay and 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 remainder 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).
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request because she initially responded, and later certified in the Statement of Information, that no responsive documents exist. Further, the evidence of record supports this response. N.J.S.A. 47:1A-6; See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).



4. The Custodian failed to respond immediately to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). Moreover, the Custodian's unnecessary extensions, due largely in part to Ms. Vazquez's lack of urgency to determine if records existed, resulted in a "deemed denial" of the remainder of the Complainant's OPRA request. However, the Custodian responded on October 8, 2015, stating that no records existed and certifying accordingly in the SOI. Additionally, there is no evidence in the record to refute the Custodian's certification. Further, the evidence of record does not indicate that either the Custodian or Ms. Vazquez's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian and Ms. Vazquez's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of March, 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: March 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-312

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of any and all quotes, requisitions, purchase orders, invoices, and/or checks (or other forms of payments such as credit card receipts) for Senator Raymond Lesniak’s round trip to China, including meals and lodging, to attend the China-U.S. Forum on Higher Education and Economic Growth event held at Wenzhou Kean in 2014.

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: August 3, 2015
Response Made by Custodian: August 13, 2015
GRC Complaint Received: October 2, 2015

Background³

Request and Response:

On August 2, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 13, 2015, the Custodian responded in writing, advising the Complainant that an extension of time until August 27, 2015, was necessary to process the OPRA request appropriately. On August 27, 2015, the Custodian responded in writing, advising that an extension until September 10, 2015 was necessary to process the OPRA request appropriately. On September 10, 2015, the Custodian responded in writing, advising that an extension until September 24, 2015, was necessary to process the OPRA request appropriately. On September 24, 2015, the Custodian responded in writing, advising that an extension until October 8, 2015, was necessary to process the OPRA request appropriately.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

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.

Denial of Access Complaint:

On October 2, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by continuously extending the time frame to respond to his OPRA request. The Complainant also argued that the Custodian violated N.J.S.A. 47:1A-5(e) because the responsive records are likely either bills or vouchers defined as “immediate access” records.

The Complainant argued that the Custodian failed to identify a legitimate reason for the extensions. Additionally, the Complainant asserted that the Custodian failed to provide a definitive date on which she would disclose the responsive records. The Complainant also contended that the Custodian failed to attempt to reach a reasonable accommodation.

Additional Submissions:

On October 8, 2015, the Custodian responded to the Complainant in writing that no records responsive to the subject OPRA request existed because Senator Lesniak did not attend the referenced event.

Statement of Information:

On October 13, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 3, 2015. The Custodian noted that the subject OPRA request was one (1) of six (6) OPRA requests that the Complainant had submitted that same day. The Custodian certified she forwarded the request (along with two (2) related requests) on August 3, 2015, to Felice Vazquez, Acting Associate Vice President for Strategic Initiatives and Special Counsel. The Custodian certified that, having not received a response from Ms. Vazquez, she initially responded in writing on August 13, 2015, seeking an extension of time. The Custodian affirmed that she e-mailed Ms. Vazquez on August 25, 2015, seeking an update on the subject OPRA request. The Custodian certified that Ms. Vazquez e-mailed her on August 26, 2015, advising that she was still “working on the [request].” The Custodian certified that she sought three (3) additional extensions, at which point she e-mailed Ms. Vazquez on September 25, 2015, seeking a meeting regarding the subject OPRA request. The Custodian affirmed that she met with Ms. Vazquez on September 29, 2015, who advised that she completed her review but that recent personnel changes required additional review. The Custodian certified that Ms. Vasquez confirmed, on October 8, 2015, that no records responsive to the subject OPRA request existed because Senator Lesniak did not attend the event in question. The Custodian certified that she responded to the Complainant on the same day, advising that no responsive records existed.

The Custodian argued that another office within Kean caused that the delay in her response. The Custodian contended that she relied on the other office for information during the extended time frames and that she regularly inquired about the subject OPRA request. The Custodian argued that her efforts to locate responsive records, and the corresponding extensions, were therefore reasonable.

The Custodian further noted that any potential claims that her ultimate denial was improper would be unpersuasive. The Custodian argued that the Complainant's sole request sought records associated with Senator Lesniak's trip, which he did not attend. The Custodian noted that records provided in response to a subsequent OPRA request were not responsive to the subject OPRA request. The Custodian contended that, for this reason, those records should not be considered as part of this complaint.

Additional Submissions:

On November 15, 2015, the Complainant submitted a rebuttal to the SOI. The Complainant first asserted that the Custodian's reliance on the fact that the Complainant had filed six (6) OPRA requests on the same day was merely an excuse for failing to respond timely. The Complainant asserted that this excuse did not warrant an extension. Further, the Complainant disputed that the six (6) OPRA requests substantially disrupted Kean's operations. The Complainant noted that all six (6) requests sought travel records for employees, "friends," and other individuals connected to Kean. The Complainant contended that, after he submitted the subject OPRA request and others, the Star Ledger ran an article a few weeks later, confirming that a ticket was purchased for Senator Lesniak. The Complainant noted that the article quoted a Kean spokesperson, who stated that the flight costs were paid on August 5, 2015, and that it hired a firm to ensure reimbursement. The Complainant asserted that the timing of those statements prove that locating records responsive to the subject OPRA request, as well as the five (5) others submitted on August 3, 2015, did not require a protracted extension.

Additionally, the Complainant contended that the Custodian identified Ms. Vazquez as the reason for the delay. The Complainant requested that the GRC consider whether Ms. Vazquez knowingly and willfully violated OPRA. N.J.S.A. 47:1A-11. The Complainant also requested that the GRC consider sending the instant complaint to the Office of Administrative Law ("OAL") to determine whether Ms. Vazquez's ties to Senator Lesniak⁴ influenced her delayed response to the Custodian. The Complainant alleged that it is suspicious that Ms. Vazquez did not respond to the Custodian until one (1) day after the filing of this complaint.

Moreover, the Complainant alleged that he was disconcerted by the Custodian's proactive argument that records provided in response to a separate OPRA request were not at issue here. The Complainant noted that he contacted Geri Benedetto, Esq., Kean's Counsel, John Hoffman, Esq., Acting Attorney General (and Custodian Counsel's boss), and others about the existence of the tickets. The Complainant asserted that he again contacted those same individuals when Kean provided copies of the tickets on October 22, 2015. The Complainant contended that the fact that the Attorney General and Kean's Counsel were sharing information is one more reason to send the complaint to OAL for a knowing and willful hearing.

Finally, the Complainant contended that the Custodian misinterpreted the subject OPRA request, thus resulting in an unlawful denial of the physical tickets purchased for Senator Lesniak. The Complainant contended that he submitted a similarly worded OPRA request subsequent to the subject OPRA request as follows:

⁴ The Complainant alleged that Ms. Vazquez was previously employed by Weiner, Lesniak, LLP., which is Senator Lesniak's law firm.

- Subject OPRA request: “[Copies] of any and/or all quotes, requisitions, purchase orders, invoices, and/or checks (or other forms of payment, such as credit card receipts) for the round trip air travel to China, as well as meals and lodging associated with this trip, for [Senator] Lesniak's attendance at the China-US Forum on Higher Education and Economic Growth event held at Wenzhou Kean in 2014.
- Subsequent OPRA request: [Copies] of any and/or all quotes, requisitions, purchase orders, invoices, and/or checks (or other forms of payment, such as credit card receipts) for the round trip air travel, which [Kean] purchased to fly [Senator] Lesniak and possibly a guest to China sometime in late October or in November 2014. Senator Lesniak may not have taken this trip, but there should be a record for the initial purchase(s) of ticket(s) for this trip.

The Complainant contended that the subsequent OPRA request resulted in disclosure of those tickets, which Senator Lesniak did not use due to illness. The Complainant contended that, notwithstanding the similarities, the Custodian disclosed the tickets in response to the subsequent OPRA request and not the subject OPRA request. The Complainant further asserted that the Custodian should have disclosed the tickets in response to the subject OPRA request. The Complainant alleged that the Custodian and Ms. Vazquez instead erroneously interpreted the subject OPRA request in a way that would allow them to respond that no records exist. The Complainant also alleged that the evidence of record appeared to support that Custodian and Ms. Vazquez knowingly and willfully found a way to deny him access to the tickets without relying on any OPRA exemptions.

Analysis

Timeliness

Immediate Access

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

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g),

⁵ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

and N.J.S.A. 47:1A-5(i).⁶ *See* Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). *See also* Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007)(holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records).

Here, the portion of the Complainant's OPRA request sought "purchase orders [and/or] invoices" for Senator Lesniak's planned trip to Wenzhou Kean in 2014. Such records are easily identifiable as "bills," which categorically are considered records subject to "immediate access." N.J.S.A. 47:1A-5(e).

Although the Custodian argued in the SOI that her response was delayed by her reliance on other offices, she still had an obligation to respond immediately to the request for the records by granting or denying access, requesting additional time to respond, or requesting clarification. The evidence of record reveals, however, that the Custodian did not initially respond to the Complainant's request by seeking an extension to respond until August 13, 2015, which she certified represented the seventh (7th) business day following receipt of the request. Although within the normal statutory time frame, the Custodian had "an obligation to immediately" respond to a Complainant by granting access, denying access, seeking clarification, or requesting an extension time (which she ultimately did) to this portion of the request. *See also* Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). *See* Cody, GRC 2005-98 and Harris, GRC 2011-65. *See also* Herron, GRC 2006-178.

Extensions of Time

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

⁶ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. *See* Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

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 OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
August 13, 2015	August 27, 2015	So that the OPRA request may “be appropriately processed.”
August 27, 2015	September 10, 2015	So that the OPRA request may “be appropriately processed.”
September 10, 2015	September 24, 2015	So that the OPRA request may “be appropriately processed.”
September 24, 2015	October 8, 2015	So that the OPRA request may “be appropriately processed.”

The non-immediate access portion of the August 2, 2015 OPRA request, one (1) of six (6) requests submitted on the same day, sought “quotes, requisitions . . . and/or checks” for Senator Lesniak’s round trip travel to China for the Wenzhou Kean event in 2014. The Custodian extended the response time on four (4) occasions before responding on October 8, 2015, that no records existed. Those extensions amounted to forty-seven (47) business days. As noted above, a requestor’s approval is not required for a valid extension. However, the GRC notes that the record here is unclear whether or not the Complainant agreed to the extensions prior to filing the instant complaint: neither party included correspondence indicating that the Complainant either disputed the extensions or agreed.⁷

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.⁸

The evidence of record indicates that the Custodian worked with Ms. Vazquez to respond to the subject OPRA request. However, the evidence indicates that Ms. Vazquez did not provide her first response to the Custodian until August 26, 2015, a day prior to the Custodian obtaining the second (2nd) extension. It should be also noted that the Custodian certified in the SOI that she did not meet with Ms. Vazquez about the subject OPRA request until September 29, 2015, or twenty-two (22) business days after the Custodian obtained a second (2nd) extension. The Custodian ultimately responded on October 8, 2015, stating that no responsive records existed.⁹

⁷ In Ciccarone, GRC 2013-280, the complainant allowed for a few extensions before denying the custodian any additional time. Although the complainant’s acquiescence to extensions was a mitigating factor there, it was not the only factor on which the GRC relied to determine whether the requests for extension were reasonable.

⁸ “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*.

⁹ The GRC notes that the Complainant did not take issue with the denial of access; rather, the Complainant disputed the Custodian’s multiple extensions over a six (6) month period.

From the Custodian's receipt of the Complainant's OPRA request, she initially sought ten (10) business days to respond. The Custodian then sought an additional three (3) extensions of twenty-nine (29) business days while she waited for a response from Ms. Vazquez. Thus, the Custodian sought, in addition to the original seven (7) business days, over a full month of business days for each OPRA request. These extensions, given that no records ultimately existed, indicates that the Custodian, but more specifically Ms. Vazquez, worked with little urgency to provide a timely response. Thus, the record does not sufficiently prove any particularly harmful extenuating circumstances that would have warranted such an extensive delay.

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 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). The GRC finds it unreasonable for Kean to take more than a month to determine that no records existed. The GRC is also not persuaded that either Ms. Vazquez or the Custodian needed over a month of business days to determine whether records existed.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's August 2, 2015 OPRA request not seeking "immediate access" records, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. However, the violation largely rests with Ms. Vazquez, the point of delay for over a month of business days. Therefore, Ms. Vazquez's delay and 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 remainder 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).

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 v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Here, the Custodian responded on October 8, 2015, stating that no records existed. The Custodian subsequently certified in the SOI that no records responsive to the Complainant's OPRA request existed and argued that any records disclosed in response to unrelated OPRA requests were not relevant here. The Complainant responded to the SOI by refuting the assertion: he alleged that tickets he received in response to the unrelated OPRA request should have been provided in response to the OPRA request at issue here. The Complainant contended that the issue rested on the Custodian interpretation of "which he attended" and "for attendance."

In reviewing both the subject OPRA request and the unrelated OPRA request, the GRC is not persuaded by the Complainant's arguments. Initially, the GRC cannot determine how "which he attended" would have impacted the Custodian's response in any way. However, the disclosure of tickets in response to one request and not the other is reasonable. Specifically, the subject OPRA request sought proof of payment for the trip without reference to the tickets. Contrary to the subject OPRA request, the unrelated OPRA request explicitly referenced the tickets. The GRC is also not persuaded that the Custodian somehow misinterpreted the subject OPRA request. It is reasonable to assume that the Custodian would not have believed the physical tickets were responsive to the first OPRA request simply because the Complainant sought records reflecting payments for the trip. It is also debatable that the tickets were responsive to the Complainant's second (2nd) OPRA request, because he again sought proof of payment, notwithstanding his reference to the checks. Thus, the GRC does not find the subsequent disclosure of the tickets as evidence refuting the Custodian's certification that no records existed.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request because she initially responded, and later certified in the SOI, that no responsive documents exist. Further, the evidence of record supports such a response. N.J.S.A. 47:1A-6; See Pusterhofer, GRC 2005-49.

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 failed to respond immediately to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). Moreover, the Custodian's unnecessary extensions, due largely in part to Ms. Vazquez's lack of urgency to determine if records existed, resulted in a "deemed denial" of the remainder of the Complainant's OPRA request. However, the Custodian responded on October 8, 2015, stating that no records existed and certifying accordingly in the SOI. Additionally, there is no evidence in the record to refute the Custodian's certification. Further, the evidence of record does not indicate that either the Custodian or Ms. Vazquez's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian and Ms. Vazquez's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's August 2, 2015 OPRA request not seeking "immediate access" records, based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. However, the violation largely rests with Ms. Vazquez, the point of delay for over a month of business days. Therefore, Ms. Vazquez's delay and 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 remainder 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).
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request because she initially responded, and later certified in the Statement of Information, that no responsive documents exist. Further, the evidence of record supports this response. N.J.S.A. 47:1A-6; See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Custodian failed to respond immediately to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). Moreover, the Custodian's unnecessary extensions, due largely in part to Ms. Vazquez's lack of

urgency to determine if records existed, resulted in a “deemed denial” of the remainder of the Complainant’s OPRA request. However, the Custodian responded on October 8, 2015, stating that no records existed and certifying accordingly in the SOI. Additionally, there is no evidence in the record to refute the Custodian’s certification. Further, the evidence of record does not indicate that either the Custodian or Ms. Vazquez’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian and Ms. Vazquez’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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