



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

June 27, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2015-339

v.

Kean University
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 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 the Custodian has borne her burden of proof that there was no unlawful denial of access to the Complainant’s August 26, 2015 OPRA request, because she certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6 Furthermore, the Complainant did not provide any competent, credible evidence to refute the Custodian’s certification. Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), and Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005).

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

Final Decision Rendered by the
Government Records Council
On The 27th Day of June, 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: June 30, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-339

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “I request a copy of the letter, which is I believe four pages long, that Mark Shyrock, a Kean Faculty Member, sent and/or gave to Stephen Ferst and/or Michael Searson on the progress and other matters on ESL programs in Bangladesh.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: August 26, 2015

Response Made by Custodian: September 4, 2015; September 18, 2015; September 30, 2015

GRC Complaint Received: November 2, 2015

Background³

Request and Response:

On August 26, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 4, 2015, the Complainant responded in writing, seeking an extension of time until September 18, 2015, to respond. On September 18, 2015, the Custodian responded to the Complainant, seeking an additional extension of time to until October 2, 2015. On September 30, 2015, the Custodian responded in writing to the Complainant, stating that no responsive records exist.

Denial of Access Complaint:

On November 2, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant attached a screenshot of a portion of an e-mail he received via a previous OPRA request, which references the letter sought. The Complainant included this screenshot in the OPRA request at issue.

¹ No legal representation listed on record.

² Represented by Jennifer McGruther, DAG.

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.

Statement of Information:

On December 22, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 26, 2015. Upon receipt, the Custodian certified that she forwarded the request to Dr. Michael Searson (“Dr. Searson”) and his assistant on September 2, 2015. She received a response from Dr. Searson the next day, containing a forwarded copy of the e-mail that was the subject of the screenshot provided by the Complainant. The Custodian certified that the letter that is the subject of the request was not included as an attachment to the aforementioned e-mail.

The Custodian further certified that the multiple extensions were necessary because Mark Shyrock and Stephen Ferst were no longer employed by Kean University (“Kean”). On September 21, 2015, the Custodian received an e-mail confirming that Dr. Searson’s office had no additional knowledge about the letter at issue and had no other documents to provide. However, the Custodian was told by Dr. Searson to reach out to the Center for International Studies to inquire further regarding the letter.

The Custodian certified that on September 25, 2015, the OPRA request was forwarded to the Director of the Center for International Studies (“Director”), who told the Custodian that she would review her files for the letter. The Custodian then certified that she received a response from the Director on September 28, 2015, stating that no letter was located after a review of print and electronic records. Thereafter, the Custodian sent a disposition letter to the Complainant on September 30, 2015, stating that no responsive records exist.

The Custodian argued that because she timely responded to the Complainant that no responsive records exist, there was no denial of access and the matter should be closed. Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005) (requestor assumed the existence of records based upon “his own review and interpretation of IRS and other ‘third party’ documents”).

Furthermore, the Custodian argued that the request itself lacks the requisite “reasonable clarity” required to be a valid request. Bent, 381 N.J. Super. at 37. The Custodian noted that the OPRA request fails to provide a specific date of when the requested letter was sent or received; nor, she argued, does it identify the author of the letter. The Custodian argued that one could assume that Mark Shyrock is the author, given that he is the sender of the e-mail referencing it, but it is not entirely clear from the excerpt provided by the Complainant. According to the Custodian, the only clear information about the requested record is the subject matter; however, she noted, “OPRA does not countenance open-ended searches of an agency’s files.” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). The Custodian nevertheless conducted a search for records using the available information provided by the Complainant. The Custodian certified that she did not locate any responsive records and notified the Complainant.

Lastly, the Custodian maintained that her response was timely. According to the Custodian, the Complainant’s vagueness required her to request extensions of time to respond. *See* N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178 (App.

Div. 2007), certif. denied, 190 N.J. 394 (2007) (“There is an obvious connection between the specificity of the request and a custodian’s ability to provide a prompt reply”).

Additional Submissions

The Complainant responded to the Custodian’s SOI on January 23, 2016. The Complainant argued that Dr. Searson and others involved in the Custodian’s search “should attest to the statements in Item 10 [of the Custodian’s SOI] in a legally actionable manner.” The Complainant also suggested that the Custodian reach out to Kean’s IT department to assist in retrieving the e-mail referencing the letter at issue.

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.

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request 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 certified that she conducted a search for responsive records, notwithstanding her claim that the request was invalid for lack of specificity. *See Bent*, 381 N.J. Super. at 38. She also certified that the search yielded no responsive records and timely informed the Complainant of such on September 30, 2015. Meanwhile, the Complainant does not provide evidence to refute the Custodian’s certification, asking instead that the Custodian obtain assistance from Kean’s IT department to obtain the original e-mail referencing the requested letter. However, the Custodian had certified that she was forwarded said e-mail during her search, stating that the letter at issue was not attached.

Therefore, the Custodian has borne her burden of proof that there was no unlawful denial of access to the Complainant’s August 26, 2015 OPRA request, because she certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6 Furthermore, the Complainant did not provide any competent, credible evidence to refute the Custodian’s certification. *Pusterhofer*, GRC 2005-49, and *Bent*, 381 N.J. Super. at 38.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that there was no unlawful denial of access to the Complainant’s August 26, 2015 OPRA request, because she certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6 Furthermore, the Complainant did not provide any competent, credible evidence to refute the Custodian’s certification. *Pusterhofer v. NJ Dep’t of Educ.*, GRC

Complaint No. 2005-49 (July 2005), and Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

June 20, 2017