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DEPARTMENT OF COMMUNITY AFFAIRS  
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Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

FINAL DECISION

May 23, 2017 Government Records Council Meeting

Luis F. Rodriguez  
Complainant

v.

Kean University  
Custodian of Record

Complaint No. 2015-363

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 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 evidence of record supports that Kean University created Kean University Foundation and that the Custodian should have handled the subject OPRA request in accordance with N.J.S.A. 47:1A-5(h). However, the Custodian violated N.J.S.A. 47:1A-5(h) by failing either to forward the subject OPRA request to the Foundation or direct the Complainant to the proper custodian of record. Kumka (Northern Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (Interim Order dated July 25, 2007).
3. The Custodian has borne his burden of proof that she lawfully denied access to the complainant’s OPRA request because she certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; See Pusterhofer v. 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). Further, the Custodian violated N.J.S.A. 47:1A-5(h) because she failed either to forward the OPRA request to the Kean University Foundation or direct the Complainant to the proper custodian of



record. However, Kean University and Kean University Foundation are separate entities with separate custodians; thus, the evidence of record indicates that Kean University was not in possession of any responsive records. Further, 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 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 23<sup>rd</sup> Day of May, 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: May 30, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 23, 2017 Council Meeting**

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

**GRC Complaint No. 2015-363**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of the activity statements (usually sent to card holders) for the Kean University Foundation’s (“Foundation”) credit card(s) used by Carla Willis from September 2014 to the most recent available statement.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** October 26, 2015  
**Response Made by Custodian:** November 5, 2015  
**GRC Complaint Received:** November 17, 2015

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

**Request and Response:**

On October 24, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 5, 2015, the Custodian responded in writing, denying the Complainant’s OPRA request. The Custodian stated that the Foundation does not fall under the definition of a “public agency” under OPRA because, among other factors, it is a §501(c)(3) entity.

**Denial of Access Complaint:**

On November 17, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access, contending that an organization’s status as a §501(c)3 does not automatically exempt that organization from OPRA. *See Renna v. Union Cnty. Alliance*, 2013 N.J. Super. Unpub. LEXIS 419 (App. Div. 2013)(defining a “public agency” under OPRA). The Complainant argued that OPRA designates that “instrumentalities” can also be considered public agencies under OPRA.

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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.

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See also Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519 (2005); Fair Share Hous. Ctr., Inc., v. NJ State League of Municipalities, 207 N.J. 489 (2011).

The Complainant asserted that the Foundation is clearly a “public agency” that is subject to OPRA when applying the “Creation and Control” test used in NJLM. Regarding the “creation” prong of the test, the Complainant contended that compelling evidence proves that Kean University (“Kean”) created the Foundation by its actions. The Complainant cited to the autobiography of Nathan Weiss, Kean’s president at that time, and his description of the creation of the Foundation, where he wrote:

At my request, Charles Kimmett announced at the September board meeting that the administration was recommending that a private foundation be organized to raise funds for [Kean] and that the planned foundation would be in conformity with the New Jersey Public College Auxiliary Act. Organizing under the Auxiliary Act guaranteed that the foundation would be accountable to the board of trustees . . . . [A]fter many confrontations, much dialogue, and numerous changes, a Kean . . . foundation was established, bylaws were approved, and a board of directors was appointed. The first executive director of the foundation took office early in 1989.

Weiss, N. (1994) *At the Center of the Storm: Reflections of a State College President*. Metuchen, NJ: Upland Press at 165-166.

Regarding the “control” prong of the test, the Complainant contended that there is overwhelming evidence supporting that Kean is tied inextricably to the Foundation. The Complainant asserted that a large portion, if not the entirety, of the Foundation’s paid staff are paid directly by Kean. The Complainant noted that a list provided by the Kean Federation of Teachers evidences that Kean paid Ms. Willis, the person whose statements he requested, in fiscal year 2014. The Complainant also noted that he located five (5) additional Foundation employees on the Kean payroll in fiscal year 2014. The Complainant further asserted that Ms. Willis and other Foundation employees participated in the Alternate Benefits Program (“ABP”), which is administered by the New Jersey Department of Treasury, Division of Pensions & Benefits. Finally, the Complainant argued that Ms. Willis, in an online professional account, holds herself out as Kean’s employee. Also, the Complainant contends that Kean has acknowledged that Ms. Willis is an employee (Vice President for Institutional Advancement) and further claims that Kean has the ability to hire and terminate her staff.

The Complainant contended that all of the forgoing proves that the Foundation is subject to OPRA. The Complainant further argued that the Custodian should have disclosed any responsive records but violated OPRA when she failed to do so.

#### Statement of Information:

On December 23, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 26, 2015. The Custodian certified that she met with individuals within Kean and determined that the Foundation was a separate entity from Kean and that it did not maintain the Foundation’s

records. The Custodian certified that she responded in writing on November 5, 2015, denying the request because Kean believed the Foundation was not a “public agency” for purposes of OPRA.

The Custodian contended that she timely responded to the Complainant’s OPRA on the seventh (7<sup>th</sup>) business day after receipt of it. Further, the Custodian contended that she lawfully denied access to the responsive records because the Foundation was a separate entity and Kean did not possess any of the responsive records. *See Bent v. Twp. of Stafford Police Dep’t*, 381 N.J. Super. 30, 38 (App. Div. 2005).

#### Additional Submissions:

On January 6, 2016, the Complainant submitted a rebuttal to the SOI. Therein, the Complainant asserted that the Custodian’s suggested reason for denial in the SOI (no records exist) is contrary to the actual denial he received. The Complainant argued that the Custodian never once insinuated that no records existed until after he filed the instant complaint. The Complainant contended that if the Foundation truly were a separate organization, then the Custodian should have responded that no records exist. However, the Complainant argued that the Custodian’s response unnecessarily delayed his ability to submit an OPRA request directly to the Foundation. The Complainant asserted that he believed that such a misleading response was a violation of OPRA.

On January 14, 2016, the Complainant e-mailed the GRC to add to his rebuttal. Therein, the Complainant argued that the Custodian had an obligation under N.J.S.A. 47:1A-5(h) either to return the request to him and direct him to the Foundation or forward his request directly to the Foundation. The Complainant argued that, based on his evidence that Kean and the Foundation were inextricably linked, the Custodian violated N.J.S.A. 47:1A-5(h) by failing to perform one of the above actions.

On April 12, 2017, the GRC submitted a request for additional information to the Custodian in accordance with N.J.A.C. 5:105-2.4(l). Therein, the GRC requested that the Custodian provide a certification answering the following:

1. Does the Foundation consider itself a “public agency” subject to OPRA?
2. If so, did the Foundation have a designated custodian of record at the time of the Complainant’s October 24, 2015 OPRA request?
3. What is the relationship between Kean’s Offices of Institutional Advancement and the Foundation?

The GRC requested that the Custodian submit her response by close of business on April 18, 2017.

On April 18, 2017, Kean requested an extension until April 21, 2017. On April 19, 2017,<sup>4</sup> the Custodian’s Counsel responded to the GRC’s request for additional information. Therewith, Custodian’s Counsel included pleadings from Rodriguez v. Kean, et al, Docket No. UNN-L-

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<sup>4</sup> On the same day, the GRC e-mailed the parties, advising that it would accept Custodian Counsel’s response as timely based on Kean’s request for an extension of time.

340-16, wherein Ms. Willis was identified as the custodian of record for the Foundation. Counsel stated that Rodriguez, UNN–L-340-16, addressed a request that sought, among other records, Foundation credit card statements. Counsel noted that plaintiff subsequently requested those records from the Foundation and received them. Counsel stated that the pleadings indicate that Kean and the Foundation are separate entities with separate custodians.

## Analysis

### Timeliness

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).<sup>5</sup> 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), and N.J.S.A. 47:1A-5(i).<sup>6</sup> 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 Complainant requested “activity statements” for credit card(s) issued to Ms. Willis. In three (3) recent cases, the Council has found that such statements are identifiable as “bills,” which categorically are considered records subject to “immediate access.” See Rodriguez v. Kean University, GRC 2015-298 (January 2017); Rodriguez v. Kean University, GRC 2015-345 (January 2017); Rodriguez v. Kean University, GRC 2016-269 (March 2017); and N.J.S.A. 47:1A-5(e). The evidence of record reveals, however, that the Custodian did not initially respond to the Complainant’s request denying same until November 5, 2015, which was the seventh (7<sup>th</sup>) 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 granting access, denying access, seeking clarification, or requesting an extension time. See also Kohn v. Twp. of

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<sup>5</sup> 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.

<sup>6</sup> 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).

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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.

### **Forwarding or Directing an OPRA Request**

OPRA provides that "[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." N.J.S.A. 47:1A-5(h). The custodian thus has an affirmative duty to direct the requestor to the proper custodian of record or forward the OPRA request to the proper custodian of record when that agency's files are not maintained by the agency in receipt of the request. Id.

The GRC first notes that it has previously determined that a university's foundation is considered a "public agency" for purposes of OPRA. See Dusenberry v. NJ City Univ. Found., GRC Complaint No. 2012-82 (May 2013). Further, the Complainant's Denial of Access Complaint and the Custodian Counsel's April 18, 2017 submission reveals that the Foundation falls within the definition of a "public agency" for purposes of OPRA. Further, Counsel's submission identified that the Foundation designated Ms. Willis as the custodian of record.

The Council has previously determined that a custodian violated N.J.S.A. 47:1A-5(h) by failing to forward a request to an "instrumentality" of that agency where it did not retain custodial control of records. By way of example, in Kumka (Northern Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (Interim Order dated July 25, 2007), the Council held that the Englewood Economic Development Corporation ("EEDC") was a "public agency" for purposes of OPRA because it was created by City ordinance. Further, the Council determined that the custodian violated N.J.S.A. 47:1A-5(h) because she failed either to forward the OPRA request to the EEDC or direct the complainant to the proper custodian. See also Weippert v. Borough of Netcong (Morris), GRC Complaint No. 2013-358 (July 2014).

Here, the evidence supports that Kean created the Foundation through action of the administration in the early 1980s. Further, the Foundation has identified itself as such through litigation in Rodriguez, UNN-L-340-16. Thus, it is reasonable that the Custodian should have responded in a manner consistent with N.J.S.A. 47:1A-5(h). However, similar to the custodian's actions in Kumka, the Custodian here failed to forward the subject OPRA request to the

Foundation. Neither did she direct the Complainant to the proper custodian. Thus, the GRC finds that the Custodian violated N.J.S.A. 47:1A-5(h).<sup>7</sup>

Accordingly, the evidence of record supports that Kean created the Foundation and that the Custodian should have handled the subject OPRA request in accordance with N.J.S.A. 47:1A-5(h). However, the Custodian violated N.J.S.A. 47:1A-5(h) by failing either to forward the subject OPRA request to the Foundation or direct the Complainant to the proper custodian of record. Kumka, GRC 2007-07.

### **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 initially responded to the Complainant, stating that the Foundation was not a “public agency” for purposes of OPRA. Thereafter, in the SOI, the Custodian certified that Kean and the Foundation were separate entities and that she did not maintain the Foundation’s records. In response to a request for additional information, Custodian’s Counsel provided pleadings in Rodriguez, UNN–L-340-16, which showed that Kean and the Foundation operated as separate entities for purposes of OPRA. Further, the pleadings showed that Ms. Willis was the designated custodian of record for the Foundation and confirmed the Custodian’s SOI certification. Based on this evidence, the GRC is satisfied that no responsive records exist.

Accordingly, the Custodian has borne his burden of proof that she lawfully denied access to the Complainant’s OPRA request because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *See Pusterhofer*, GRC 2005-49.

### **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.

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<sup>7</sup> The GRC notes that the requirements of N.J.S.A. 47:1A-5(h) may not necessarily apply in instances where a custodian for an agency receives an OPRA request for records maintained by another agency with no connection to the former (*i.e.*, a request made to the New Jersey State Police for records maintained by a local police department). *Luis Rodriguez v. Kean University*, 2015-363 – Findings and Recommendations of the Executive Director



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). Further, the Custodian violated N.J.S.A. 47:1A-5(h) because she failed either to forward the OPRA request to the Foundation or direct the Complainant to the proper custodian of record. However, Kean and the Foundation are separate entities with separate custodians; thus, the evidence of record indicates that Kean was not in possession of any responsive records. Further, 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 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 evidence of record supports that Kean University created Kean University Foundation and that the Custodian should have handled the subject OPRA request in accordance with N.J.S.A. 47:1A-5(h). However, the Custodian violated N.J.S.A. 47:1A-5(h) by failing either to forward the subject OPRA request to the Foundation or direct the Complainant to the proper custodian of record. Kumka (Northern Valley

Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (Interim Order dated July 25, 2007).

3. The Custodian has borne his burden of proof that she lawfully denied access to the Complainant's OPRA request because she certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. 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). Further, the Custodian violated N.J.S.A. 47:1A-5(h) because she failed either to forward the OPRA request to the Kean University Foundation or direct the Complainant to the proper custodian of record. However, Kean University and Kean University Foundation are separate entities with separate custodians; thus, the evidence of record indicates that Kean University was not in possession of any responsive records. Further, 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 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.

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

May 16, 2017