



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 22, 2018 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2016-156

v.

Kean University
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 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. Public Schools, 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. Notwithstanding the Custodian’s deemed denial, the Council declines to order disclosure of said records because the Custodian certified that on June 1, 2016, she disclosed to the Complainant six (6) pages of records that were responsive to the Complainant’s request, and there is nothing in the evidence of record disputing sufficiency of the disclosure.
3. Although the Custodian failed to respond to the Complainant’s request for immediate access records immediately, which resulted in in a “deemed” denial of said request, the Custodian did on June 1, 2016, disclose to the Complainant six (6) pages of records that were responsive to the request, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 22nd Day of May, 2018

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 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 22, 2018 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-156

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint:

“I seek a copy of all purchase orders (i.e., vouchers) and invoices (i.e., bills) submitted by Kean USA Group to Kean University and/or to Wenzhou Kean University for the years 2015-2016 and for the years 2009-2012 (inclusivie [sic]).”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: May 2, 2016

Response Made by Custodian: May 11, 2016; May 26, 2016; June 1, 2016

GRC Complaint Received: June 1, 2016

Background³

Request and Response:

On May 2, 2016, the Complainant submitted an (2) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 11, 2016, the Custodian responded in writing, seeking an extension of time to respond to the Complainant’s request to until May 26, 2016.

Denial of Access Complaint:

On June 1, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his request for immediate access records on May 2, 2016, but thereafter received two (2) extensions of time from the Custodian without sufficient explanation. Moreover, the Complainant argued that the Custodian neither consulted with him nor sought his permission when announcing the extensions.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Additionally, the Complainant stated that the Custodian did not set a firm date to respond to his request, but rather extended the time to respond by fourteen (14) days. See N.J.S.A. 47:1A-5(g).

Statement of Information:

On July 28, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 2, 2016.

The Custodian certified that the request was forwarded to its appropriate “Office of Record” on May 2, 2016, with a follow-up e-mail sent on May 5, 2016. The Custodian certified that when it appeared that additional time was required, an extension letter was sent on May 11, 2016. The Custodian then certified that responsive records were received on May 25, 2016, but determined that the records were still incomplete. Therefore, the Custodian certified that she submitted a second extension letter on May 26, 2016. Thereafter, the Custodian determined that all responsive records had been collected, and delivered them to the Complainant on June 1, 2016.

The Custodian contended that although the Complainant sought immediate access records, the request did not specify the record in question, but rather sought purchase orders and bills spanning a six (6) year period. Therefore, the Custodian argued that the request could not be considered a standard immediate access record. See, e.g., Brennan v. Bergen Cnty. Prosecutor’s Office, 2015 N.J. Super. Unpub. LEXIS 403, *29 (Law Div. Feb. 25, 2015). The Custodian stated that a request for immediate access records which span over several years could not be ordinarily provided immediately, and thus timely sought an extension on the seventh (7th) business after receiving the request.

The Custodian further argued that extensions of time to respond to OPRA requests are appropriate under certain circumstances, stating they “reflect the Legislature’s intention to balance the requestor’s interest in prompt access to identifiable records and the operational needs of government.” N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div.), certif. denied, 190 N.J. 394 (2007). The Custodian noted that factors considered when assessing the reasonableness of extensions include whether or not the record is stored or archived, or “if a request for access would to a government record would substantially disrupt agency operations.” N.J.S.A. 47:1A-5(i). The Custodian also quoted: “[t]here is an obvious connection between the specificity of the request and custodian’s ability to provide a prompt reply.” N.J. Builders Ass’n, 390 N.J. Super. at 178. Lastly, the Custodian stated that because the records were disclosed to the Complainant, the complaint is now moot.

Additional Submissions

On August 17, 2016, the Complainant responded to the Custodian’s SOI, arguing that the Custodian failed to provide any mitigating or unusual circumstances to justify the extensions. Additionally, the Complainant objected to the Custodian’s failure to identify each office she reached out to locate responsive records.

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).⁴ 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 dated 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).⁵ See Cody v. Middletown Twp. Public Schools, 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 immediately notify the complainant as to the status of immediate access records.

Here, the Complainant requested "purchase orders (i.e., vouchers) and invoices (i.e., bills)." Purchase orders, vouchers, invoices, and bills are immediate access records under N.J.S.A. 47:1A-5(e). As such, the Custodian had an obligation to respond to the request for the records immediately, 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 until May 11, 2016, which was the seventh (7th) business day following receipt of the request. While the Custodian's argument that the lack of specificity in the request may justify the need for the extensions, the Custodian still needed to immediately notify the Complainant of that necessity. See Herron, GRC 2006-178.

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.

⁴ 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.

⁵ 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).

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.

Notwithstanding the Custodian’s deemed denial, the Council declines to order disclosure of said records because the Custodian certified that on June 1, 2016, she disclosed to the Complainant six (6) pages of records that were responsive to the Complainant’s request, and there is nothing in the evidence of record disputing sufficiency of the disclosure.

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 that “[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, although the Custodian failed to respond to the Complainant’s request for immediate access records immediately, which resulted in in a “deemed” denial of said request, the Custodian did on June 1, 2016, disclose to the Complainant six (6) pages of records that were responsive to the request, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 Council Staff 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. Public Schools, 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. Notwithstanding the Custodian's deemed denial, the Council declines to order disclosure of said records because the Custodian certified that on June 1, 2016, she disclosed to the Complainant six (6) pages of records that were responsive to the Complainant's request, and there is nothing in the evidence of record disputing sufficiency of the disclosure.
3. Although the Custodian failed to respond to the Complainant's request for immediate access records immediately, which resulted in a "deemed" denial of said request, the Custodian did on June 1, 2016, disclose to the Complainant six (6) pages of records that were responsive to the request, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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: Samuel A. Rosado
Staff Attorney

May 15, 2018