



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

**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. 2016-157

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 the Custodian has borne her burden of proof that she timely responded to the Complainant’s May 2, 2016 OPRA request. N.J.S.A. 47:1A-6. Correspondence does not fall under the class of records identified as immediate access records under N.J.S.A. 47:1A-5(e). Additionally, the Custodian’s extensions of time to respond to the Complainant’s request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone v. NJ Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); and Werner v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012).

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 22<sup>nd</sup> 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 Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-157**

v.

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

**Records Relevant to Complaint:**

“I seek a copy of all correspondence between Michael Bostian and any and all members of the ILSE leadership team (<http://ilsebio.com/leadership-team/>) for the years 2015-2016 inclusive on the expansion plans for the ILSE as mentioned in the press release immediately below.

2<sup>nd</sup> ILSE Stakeholder Forum – March 8, 2016

Posted on March 30, 2016”

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** May 2, 2016

**Response Made by Custodian:** May 11, 2016; May 26, 2016; June 9, 2016

**GRC Complaint Received:** June 1, 2016

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

**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

---

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

<sup>2</sup> Represented by Jennifer McGruther, DAG.

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

access records on May 2, 2016, but thereafter received two (2) extensions of time from the Custodian without sufficient explanation. 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. On May 6, 2016, the Custodian determined that no employee existed at Kean University with the name “Michael Bostian.” However, the Custodian certified that additional discussion was needed to determine whether any responsive records existed, and therefore notified the Complainant on May 11, 2016 that she needed an extension of time. The Custodian certified that the request was forwarded to another “Office of Record” during this extended period. A follow-up e-mail was sent on May 26, 2016 as well as a second extension letter. A final follow-up e-mail was sent on June 9, 2016, and the Custodian certified that she received confirmation that no responsive records exist. Therefore, the Custodian certified that she send a disposition letter that same day.

The Custodian contended that although the Complainant asserted that the requested records are bills or vouchers, the request was actually for correspondence between a “Michael Bostian” and members of the “ILSE leadership team” (“ILSE”). Upon receipt the Custodian certified that members of the ILSE were contacted to determine whether they have any relevant records. Upon confirming that no responsive records exist, the Custodian asserted that she promptly notified the Complainant of such, and therefore there cannot be a denial of access. See Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005).

The Custodian 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. In this instance, the Custodian argued that the request sought communications between several individuals, kept the Complainant apprised on the status of the request, and promptly notified the Complainant after confirming that no responsive records exist.

Lastly, the Custodian stated that because the records were disclosed to the Complainant, the complaint is now moot and should be dismissed. See Mason v. City of Hoboken, Docket No.

A-0508-06T5, 2008 N.J. Super. Unpub. LEXIS 1660, \*7 (App. Div. Jan. 29, 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request).

### 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

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

However, 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>4</sup> 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.

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 (4<sup>th</sup>) 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 consent 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 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 (2<sup>nd</sup>) 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

---

<sup>4</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).

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 (6<sup>th</sup>) 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. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep’t of Treas., 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.” See also Rodriguez v. Kean Univ., 2015-77 (September 2017).

As noted above, a requestor’s approval is not required for a valid extension. However, 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. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to respond effectively to the request.<sup>5</sup> Id. Although the Custodian does not require permission to extend the time to respond to an OPRA request, the

---

<sup>5</sup> “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*.

burden remains with the Custodian to justify the need for such extension(s). That burden increases when the extension of time is measured in months rather than days.

Here, the Complainant requested “correspondence between Michael Bostian and any and all members of the ILSE leadership team . . . .” However, in his complaint the Complainant asserted that he sought bills or vouchers. There is no evidence in the record that the OPRA refers to any form of record beyond correspondence, which is not among the records classified as immediate access records under N.J.S.A. 47:1A-5(e). As such, the Custodian did not have an obligation to respond to the request immediately, granting or denying access, requesting additional time to respond, or requesting clarification. Additionally, the evidence of record reveals that the Custodian initially responded to the Complainant’s request on May 11, 2016, the seventh (7<sup>th</sup>) business day following receipt of the request. Furthermore, the Custodian extended the time to respond on three (3) occasions, for a total of twenty-six (26) business days. She certified that she made efforts to follow up with respective offices on the status locating records from several individuals. Although not insignificant, the extensions are not so egregious as to be unreasonable in confirming the existence of responsive records.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant’s May 2, 2016 OPRA request. N.J.S.A. 47:1A-6. Correspondence does not fall under the class of records identified as immediate access records under N.J.S.A. 47:1A-5(e). Additionally, the Custodian’s extensions of time to respond to the Complainant’s request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone, GRC 2013-280; and Werner, GRC 2011-151.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the Custodian has borne her burden of proof that she timely responded to the Complainant’s May 2, 2016 OPRA request. N.J.S.A. 47:1A-6. Correspondence does not fall under the class of records identified as immediate access records under N.J.S.A. 47:1A-5(e). Additionally, the Custodian’s extensions of time to respond to the Complainant’s request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone v. NJ Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); and Werner v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012).

Prepared By: Samuel A. Rosado  
Staff Attorney

May 15, 2018