



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 27, 2018 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2016-196

v.

Kean University
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request No. 1 based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request No. 2. 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 it 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).
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s two (2) OPRA requests 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’s failure to respond to the Complainant’s second (2nd) OPRA request “immediately” resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian’s extension in relation to the first (1st) OPRA request was reasonable. Further, the Custodian did not unlawfully deny access to any responsive records because none existed. Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA had a positive element of conscious



wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do 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 27th Day of February, 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: March 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
February 27, 2018 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2016-196

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of:

1. Correspondence for the year 2016 between Kean University (“Kean”) and the buyer and/or buyer’s agent and/or attorney related to the 2016 sale of 230 Surrey Road in Hillside, New Jersey.
2. Any contracts between Kean and the buyer and/or buyers of 230 and 240 Surrey Road.

Custodian of Record: Laure Barkley-Haelig
Request Received by Custodian: May 25, 2016
Response Made by Custodian: June 8, 2016
GRC Complaint Received: July 12, 2016

Background³

Request and Response:

On May 25, 2016, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On the same day, the Complainant e-mailed the Custodian regarding OPRA request No. 1 stating that “240 Surrey Road” may have also been part of the “transaction.” On May 26, 2016, the Complainant e-mailed the Custodian regarding OPRA request No. 2 noting that he did not know whether 230 and 240 Surrey Road were sold, but sought contracts for “whatever transaction” occurred with 220 Surrey Road, LLC. On June 8, 2016, the Custodian responded in writing, advising that an extension until June 22, 2016, was necessary to process the OPRA requests appropriately. On June 22, 2016, the Custodian responded in writing, advising that an extension until July 6, 2016, was necessary to process the OPRA requests appropriately. On July 6, 2016, the Custodian responded in writing, advising that an extension until July 20, 2016, was necessary to process the OPRA requests 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 July 12, 2016, 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 requests. 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.

The Complainant also noted that his OPRA request No. 2 sought contracts, which are considered “immediate” access records. The Complainant argued that the Custodian should have provided immediate access to the responsive contracts, especially because they were recently executed.

Supplemental Response:

On July 14, 2016, the Custodian responded in writing denying both OPRA requests because no responsive records existed.

Statement of Information:

On August 1, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she had previously received the Complainant’s OPRA requests on May 25, 2016. The Custodian averred that she received six (6) other OPRA requests at the same time, which the Complainant then addressed in multiple clarifications. The Custodian affirmed that she extended the response time frame on three (3) occasions to conduct a search. The Custodian certified that this search entailed providing the OPRA requests to the relevant offices for review and a determination of whether any transactions took place. The Custodian affirmed that those offices advised her that no records existed. The Custodian certified that she sought firm confirmation of this prior to responding to the Complainant, which she received on July 14, 2016. The Custodian certified that she responded in writing on that day denying both OPRA requests because no records existed.

The Custodian argued that she lawfully denied access to the subject OPRA requests because no records existed. Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005) (holding that no denial of access occurs when no records exist). Further, the Custodian contended that the OPRA requests were invalid because they lacked specificity, such as the type of transaction or the date it occurred. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 237 (App. Div. 2015). The Custodian contended that notwithstanding the vagueness of each OPRA request, she endeavored to locate responsive records. The Custodian contended that she interfaced with multiple offices and continued to follow-up regarding their searches. The Custodian averred that she advised the Complainant that no records existed promptly upon determining such.

The Custodian also contended that her extensions were reasonable. N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian asserted that although the request was arguably invalid, she endeavored to respond.

Additional Submissions:

On August 17, 2016, the Complainant emailed the GRC arguing that the Custodian failed to provide any evidence explaining why she needed extensions for these OPRA requests. The Complainant also objected to the Custodian's use of the words "Office of Record,"⁴ suggesting that her failure to identify the exact office in possession of the attachment represented withholding evidence. The Complainant also argued that the term "Office of Record" could cause confusion in later complaint filings. The Complainant further argued that not identifying the specific office or individuals involved prevents the GRC and public from determining exact repeat OPRA violators. The Complainant requested that the GRC provide a statement on record regarding the Custodian's practice of not identifying the individuals or offices assisting in OPRA request responses.

On February 2, 2018, the GRC sought additional information from the Custodian. Specifically, the GRC stated that there is no evidence in the record suggesting Kean's ownership status of 220, 230, and/or 240 Surrey Road. Thus, the GRC requested that the Custodian identify whether Kean purchased, owned, or sold those properties in 2016. The GRC required the Custodian to submit her response in the form of a legal certification by February 7, 2018.

On February 7, 2018, the Custodian's Counsel responded to the GRC's request for additional information. Counsel stated that rather than provide a certification, she attached tax records from www.yourmoney.nj.gov/transparency/property.⁵ Counsel stated that the property tax information from that site shows that Kean owned 230 and 240 Surrey Road since at least 2015. Further, Counsel averred that although the requests did not seek information on 220 Surrey Road, she included tax information showing that 220 Surrey Road, LLC obtained the property from another individual "at some point."⁶

Analysis

Timeliness

OPRA mandates that a custodian must either 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 within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to

⁴ The GRC noted that the Custodian did not use the term "Office of Record" in the SOI relevant to this complaint. However, the Complainant's submission took issue with the Custodian's failure to identify the divisions or individuals with whom she interacted.

⁵ Accessed February 13, 2018.

⁶ The website link shows that 220 Surrey Road changed ownership from an individual to 220 Surrey Road, LLC in the time frame of 2016 through 2017.

N.J.S.A. 47:1A-5(g).⁷ 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).

OPRA request No. 1

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 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

⁷ 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 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 three (3) extensions as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
June 8, 2016	June 22, 2016	So that the OPRA request may "be appropriately processed."
June 22, 2016	July 6, 2016	So that the OPRA request may "be appropriately processed."
July 6, 2016	July 20, 2016	So that the OPRA request may "be appropriately processed."

The Complainant's OPRA request No. 1 sought correspondence during 2016 between Kean and the buyer or buyer's agent related to the sale of 230 Surrey Road. The Complainant subsequently added 240 Surrey Road to the OPRA request in a follow-up e-mail on May 25, 2016. The Custodian extended the response time on three (3) occasions before responding on July 14, 2016, stating that no records existed. Those extensions amounted to twenty-nine (29) business days.⁸ As noted above, a requestor's approval is not required for a valid extension. The GRC notes, however, that the Complainant did not object to the Custodian's extensions of time prior to filing this complaint.⁹

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,

⁸ The time period is notwithstanding any closures or holidays that might have occurred during the time frame.

⁹ 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.

the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.¹⁰

Regarding the request, the Complainant sought 2016 correspondence between Kean and an unknown parties about the sale of two (2) properties. The Custodian argued in the SOI that she needed the extensions because the request was technically invalid.¹¹ A review of the request indicates that the Custodian would be required to perform an e-mail search, as well as search for hardcopy letters, memoranda, *etc.* to locate responsive records. Further, the Custodian certified in the SOI that she was required to work with several other offices to determine whether responsive records existed. Ultimately, Custodian certified that she continued to follow up with those offices and kept the Complainant apprised of the OPRA request status prior to denying access. The Custodian also noted that the Complainant filed six (6) other OPRA requests contemporaneously with multiple clarifications.

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 two (2) extensions of nineteen (19) business days. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of nearly one (1) full month of business days. However, it should be noted that the Custodian responded on July 14, 2016, four (4) business days prior to the expiration of the final extended time frame. Thus, the Custodian utilized twenty-five (25) of the twenty-nine (29) extended business days.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017) for instruction. There, the Council found that the Custodian's thirty-nine (39) business day extension to respond that no records exist was unreasonable. The Council also took the custodian and a Kean employee to task for lacking urgency in responding. The GRC sees the facts here as slightly distinguishable from Rodriguez. Specifically, the Custodian ultimately sought ten (10) fewer business days and was able to respond with a determination that no records existed in fourteen (14) fewer days. The extensions arguably appear to approach the edge of excessiveness; however, the Custodian's search (conducted with assistance of several other offices) for communications (inclusive of hardcopy documents) could reasonably have been time consuming. That search also coincided with several other pending OPRA requests. The GRC thus finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was not excessive.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request No. 1 based on warranted and substantiated extensions. N.J.S.A.

¹⁰ "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*.

¹¹ The GRC has routinely concluded that a proper OPRA request for correspondence contains: 1) a sender and/or recipient; 2) date or range of dates; and 3) subject or content. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Because the Complainant's OPRA request No. 1 contained the necessary criteria, the GRC declines to address the issue any further.

47:1A-6. Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

OPRA request No. 2

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).¹² 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’s OPRA request No. 2 sought “contracts.” Such records are “subject to immediate access.” N.J.S.A. 47:1A-5(e). Although the Custodian argued in the SOI that the OPRA request lacked specificity, the request clearly sought “contracts.” For this reason, the Custodian still 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 seeking an extension to respond until June 8, 2016, which was 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, either granting access, denying access, seeking clarification, or requesting an extension time (which she ultimately did). 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 No. 2. 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 it 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.

Finally, the GRC notes that it does not reach the issue of the extension because the second (2nd) OPRA request was already “deemed” denied at the time when the Custodian sought her first extension.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a

¹² 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 are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

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).

Further, N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant’s record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Here, the Custodian initially responded to the Complainant’s two (2) OPRA requests advising that no records existed. She subsequently certified to this fact in the SOI. On February 2, 2018, the GRC sought additional information regarding the ownership of the properties in 2016 in the form of a certification. On February 7, 2018, Custodian’s Counsel submitted additional information in lieu of a legal certification, without explanation. Notwithstanding that the GRC sought but did not receive a legal certification, it can take judicial notice of the attachments provided by Counsel. Those attachments show that Kean has owned 230 and 240 Surrey Road since at least 2015 and that there was no ownership change in 2016. In fact, the website confirms Kean’s ownership of the properties as far back as 2010, with no change in ownership status. This additional information provides sufficient proof to support that no records exist.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s two (2) OPRA requests 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. 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's failure to respond to the Complainant's second (2nd) OPRA request "immediately" resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian's extension in relation to the first (1st) OPRA request was reasonable. Further, the Custodian did not unlawfully deny access to any responsive records because none existed. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do 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 has borne her burden of proof that she timely responded to the Complainant's OPRA request No. 1 based on warranted and substantiated extensions. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request No. 2. 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 it 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).
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's two (2) OPRA requests 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's failure to respond to the Complainant's second (2nd) OPRA request "immediately" resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(e). However, the Custodian's extension in relation to the first (1st) OPRA request was reasonable.

Further, the Custodian did not unlawfully deny access to any responsive records because none existed. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do 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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