



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

March 27, 2018 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2016-236

v.

Kean University
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 timely respond 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 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). However, the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on August 24, 2016. See also Byrnes v. Twp. of Teaneck (Bergen), GRC Complaint No. 2014-83 (October 2014)(finding a “deemed” denial of access but not ordering disclosure because the records were provided during the pendency of the complaint).
2. The Custodian failed to respond timely to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on August 24, 2016. 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 27th Day of March, 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 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2016-236

v.

**Kean University²
Custodial Agency**

Record Relevant to Complaint: “I seek a copy of the contract described in Item 10 of Kean’s Statement of Information for GRC Complaint #2016-159. Given the passage of time since the bid waiver request was submitted to the Board of Trustees, the draft mentioned below should now be a fully executed contract and thus OPRAble (sic).

complaint is based (sic)

The OPRA request for a bid waiver form and accompanying documentation for a June 2015 bid waiver for Ting Xu was received on May 12, 2016. Specifically, the request sought the following:

At its June 29, 2015 meeting, the Kean University Board of Trustees passes a bid waiver resolution for professional services provided by Ting Xu. I request a copy of the bid waiver form given to the Board and any documentation accompanying the form.

It should be noted that the request that is the subject of this complaint is a duplicate request which was originally received by Kean University on September 11, 2015. A disposition letter and one responsive record, the bid waiver form, were provided to the Complainant via email on September 22, 2015.

Upon review of the resubmitted request in conjunction with the disposition letter and document provided to the Complainant in September 2015, it was determined that the University’s initial response unintentionally overlooked the attachment referenced in the responsive record and the disposition letter erroneously excluded a response to the Complainant’s specific request for “any documentation accompanying the form.” The attachment was then obtained from the Office of Record and reviewed for responsiveness. It was later determined that the document was a draft and constituted advisory, consultative and deliberative material exempt from disclosure. As such, a disposition letter was issued to the Complainant on May 23, 2016, including copies of the September 22, 2015 disposition letter and responsive document and further noting that the additional record requested was

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer L. Cavin.

exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 (1). As such, the status of the request that is the subject of this complaint is closed.” (Emphasis in original.)³

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: July 28, 2016

Responses Made by Custodian: August 10, 2016 and August 24, 2016

GRC Complaint Received: August 19, 2016

Background⁴

Request and Response:

On July 28, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 10, 2016, the ninth (9th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that an extension of time until August 24, 2016 was necessary in order to address the Complainant’s request.

Denial of Access Complaint:

On August 19, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on July 28, 2016, he sent his request to the Custodian and on August 10, 2016, the Custodian responded by extending the response time until August 24, 2016. The Complainant asserts that the document requested is a contract and is therefore an immediate access document pursuant to N.J.S.A. 47:1A-5(e). The Complainant states that the Custodian did not assert any “mitigating circumstances in her reply.” The Complainant also states that the Custodian did not contact him to see if a reasonable accommodation could be reached. The Complainant contends that by not supplying the requested document immediately the Custodian violated OPRA.

Supplemental Response:

On August 24, 2016, the Custodian e-mailed to the Complainant the record responsive to the his request, a contract between Kean University and Ting Xu.

Statement of Information:

On September 14, 2016, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on July 28, 2016, and responded in writing on August 10, 2016, requesting an extension of time to address the Complainant’s request.

³ The Complainant’s preferred means of delivery was via e-mail.

⁴ 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.

The Custodian certifies that the record responsive to the Complainant's request is an eleven (11) page Professional Services Agreement between Kean University and consultant Ting Xu.⁵ The Custodian further certifies that the request submitted by the Complainant did not specifically identify the record sought. For this reason, the Custodian certifies that files for the referenced GRC complaint had to be reviewed, the record identified, the University's Office of Record consulted, and the finalized version of the record confirmed. Because these steps were necessary, the Custodian certifies that on August 10, 2016, she notified the Complainant that she would need an extension of time until August 24, 2016. The Custodian further certifies that on August 24, 2016, the record responsive to the request was disclosed to the Complainant in unredacted form.

The Custodian's Counsel states that N.J.S.A. 47:1A-5(e) provides that "[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." (Emphasis added by Counsel.) Counsel argues that the Legislature's inclusion of the word "ordinarily" in the statute reflects its understanding that there may be circumstances where immediate access is not possible. Counsel argues that the instant complaint contains such circumstances because the Complainant did not request a specific record, ". . . but instead merely referenced a record mentioned in another document, thus requiring the Custodian to search through those records to identify the responsive document . . . precluding immediate access." Counsel further asserts that the Custodian did disclose the responsive record to the Complainant; therefore, the record was not unlawfully denied and the complaint is moot.

Additional Submissions:

On September 15, 2016, the Complainant responded to the Custodian's SOI by stating, "It is not my fault that the people at Kean seem to have problems that others do not in remembering and retrieving (sic) documents which most people would be able to find easily. Either they are violating OPRA willfully and knowingly or they are _____ (fill in the blanks)."

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).⁶ 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).

⁵ No date of the agreement was provided by the Custodian.

⁶ 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.

Here, the Custodian certified that she received the Complainant's request on July 28, 2016, and responded in writing on August 10, 2016, requesting an extension of time. The Custodian informed the Complainant in the August 10, 2016 response that she was responding on the seventh (7th) business day following receipt of the request. However, the Custodian's statement is not accurate because August 10, 2016 is the ninth (9th) business day following the Custodian's receipt of the request.⁷ When the Custodian responded on the ninth (9th) business day, she sought an extension of time until August 24, 2016, at which time the Custodian disclosed to the Complainant the record responsive to the request.

Therefore, the Custodian did not timely respond 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 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, GRC 2007-11. However, the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on August 24, 2016. See also Byrnes v. Twp. of Teaneck (Bergen), GRC Complaint No. 2014-83 (October 2014)(finding a "deemed" denial of access but not ordering disclosure because the records were provided during the pendency of the complaint).

Finally, because the Complainant's request was "deemed" denied pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), it is not necessary for the GRC to determine whether the Complainant's labyrinthine request triggered circumstances where immediate access pursuant to N.J.S.A. 47:1A-5(e) was not feasible.⁸

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

⁷ The Custodian did not assert that there was an intervening two business day closure between July 28, 2016 and August 10, 2016. Kean's Summer Session II for 2016 showed a six week session scheduled from July 5 to August 15, 2016. *See* <http://www.kean.edu/offices/registrar/academic-calendar/summer-2016> (accessed March 5, 2018). No University closings were shown to be scheduled during this time span. Furthermore, no State holidays occurred during this period.

⁸ A custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records 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).

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 timely to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on August 24, 2016. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not timely respond 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 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). However, the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on August 24, 2016. See also Byrnes v. Twp. of Teaneck (Bergen), GRC Complaint No. 2014-83 (October 2014)(finding a "deemed" denial of access but not ordering disclosure because the records were provided during the pendency of the complaint).
2. The Custodian failed to respond timely to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on August 24, 2016. 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: John E. Stewart

March 20, 2018