INTERIM ORDER

March 26, 2019 Government Records Council Meeting

Luis Rodriguez                                           Complaint No. 2015-86
Complainant
v.
Kean University                                         
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 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 complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed extended time frame providing records for in camera review, and simultaneously provided certified confirmation of compliance to the Council Staff.

2. The Custodian unlawfully denied access to the names of employees listed in the requested payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. Therefore, the Custodian must: (1) disclose to the Complainant the responsive records with the names of employees note protected under the Family Education Rights and Privacy Act unredacted; or (2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).

3. The Complainant shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall provide to the Council Staff a statement with respect to the Complainant’s willingness or refusal to purchase the
requested records. The Custodian’s response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4. ¹

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 26th Day of March, 2019

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 28, 2019

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
In Camera Findings and Recommendations of the Council Staff
March 26, 2019 Council Meeting

Luis Rodriguez\(^1\) Complainant

v.

Kean University\(^2\) Custodial Agency

Records Relevant to Complaint:

1\(^{st}\) OPRA Request
“I request a copy of all November 2014 to January 2015 bank statements for the bank accounts of Kean University [“Kean”].”

2\(^{nd}\) OPRA Request
“I request a copy of all check deposits (either individual deposits or a list of the them – for example, from a bank account register) made during November 2014 to January 2015 into all the bank accounts of Kean.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: December 21, 2015
Response Made by Custodian: January 8, 2016; January 22, 2016; February 5, 2016; February 19, 2016; March 4, 2016; March 17, 2016

GRC Complaint Received: March 24, 2016

Records Submitted for In Camera Examination: Nine (9) redacted and unredacted copies of the requested payroll statements made from November 2014 to January 2015.

Background

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the April 17, 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, found that:

\(^1\) No legal representation listed on record.
\(^2\) Represented by Deputy Attorney General Kerry Sorrano.
1. The Custodian has borne her burden of proof that she timely responded to the Complainant’s December 21, 2016 OPRA requests. N.J.S.A. 47:1A-6. 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 Rodriguez v. Kean Univ., 2015-77 (September 2017).

2. The GRC must conduct an in camera review of the responsive records to validate the Custodian’s assertion that the payroll records were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

3. The Custodian must deliver to the Council in a sealed envelope nine (9) unredacted copies of the payroll portion of the records responsive to the request, a document or redaction index listing each of the responsive records, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the in camera inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On April 25, 2018, the Council distributed its Interim Order to all parties. On May 1, 2018, the Custodian sought an extension of time to respond, to which the GRC granted until the end of business on May 9, 2018. On May 9, 2018 the Custodian responded to the Council’s Interim Order.

The Custodian provided nine (9) unredacted copies of the request payroll statements in accordance with the Interim Order. On December 12, 2018, GRC requested from the Custodian nine (9) copies of the redacted records to adequately review the records. On January 31, 2019, the Custodian provided nine (9) said copies of the requested records.

3 The in camera records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

4 The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

5 "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Analysis

Compliance

At its April 24, 2018 meeting, the Council ordered the Custodian to provide nine (9) unredacted copies of the requested payroll statements for in camera review within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance to the Council Staff. On April 25, 2018 the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on May 2, 2018.

On May 1, 2018, the fourth (4th) business day after receipt of the Council’s Order, the Custodian requested an extension of time to respond. On May 2, 2018, the GRC granted the request and extended the deadline to respond to until May 9, 2018. On May 9, 2018, the Custodian responded to the Council’s Interim Order, providing nine (9) unredacted copies of the requested records, an accompanying Vaughn Index, and a certified confirmation of compliance.

Therefore, the Custodian complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed extended time frame providing records for in camera review, and simultaneously provided certified confirmation of compliance to the Council Staff.

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. N.J.S.A. 47:1A-6.

The records at issue are payroll account statements for the months of November and December 2014, and January 2015. The Complainant disputed the redactions made to the names of the employees identified within the records.

OPRA provides that “[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . .” N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581 (2011). These include “an individual’s name, title, position, salary [and] payroll record.” Id. (emphasis added). See also Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004) (defining a “payroll record” for purposes of OPRA as records relating to payment of a public employee).

However, OPRA provides that its provisions “shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . regulation promulgated under the authority of any statute or Executive Order of the
Governor . . . any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9(a) (emphasis added).

Under Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”), “information describing a natural person’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness” shall not be considered government records subject to access. Therefore, payroll records containing financial information beyond what is required under N.J.S.A. 47:1A-10, may be redacted by the Custodian.

In the instant matter the GRC conducted an in camera examination of the submitted payroll statements. Throughout the statements, the Custodian redacted the names of individuals listed as well as associated bank account and routing numbers. The Custodian noted that the names included both students and employees. The Custodian contended that in order to ensure that information protected under the Family Education Rights and Privacy Act (“FERPA”) were not inadvertently disclosed, all names were redacted. However, FERPA protections do not apply to employees who are not also students. See 20 U.S.C. 1232g(a)(4)(B)(iii). Furthermore, the voluminous nature of the request does not permit a custodian to redact information that is otherwise subject to disclosure under OPRA.

Accordingly, the Custodian unlawfully denied access to the names of employees listed in the requested payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. Therefore, the Custodian must: (1) disclose to the Complainant the responsive records with the names of employees not protected under the Family Education Rights and Privacy Act unredacted; or (2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed extended time frame providing records for in camera review, and simultaneously provided certified confirmation of compliance to the Council Staff.

2. The Custodian unlawfully denied access to the names of employees listed in the requested payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. Therefore, the Custodian must: (1) disclose to the Complainant the responsive records with the names of employees not protected under the Family Education Rights and Privacy Act unredacted; or (2) if the Custodian believes a special service charge is warranted, she
must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).

3. The Complainant shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall provide to the Council Staff a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4. 6

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

March 19, 2019

6 "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
INTERIM ORDER

April 24, 2018 Government Records Council Meeting

Luis Rodriguez Complainant
v.
Kean University Custodian of Record

Complaint No. 2016-86

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 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 determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.

2. The GRC must conduct an in camera review of the responsive records to validate the Custodian’s assertion that the payroll records were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

3. The Custodian must deliver1 to the Council in a sealed envelope nine (9) unredacted copies of the payroll portion of the records responsive to the request, a document or redaction index listing each of the responsive records2, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,3 that the records provided are the records requested by the Council for the in camera inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.

1 The in camera records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.
2 The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
3 "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of April, 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: April 25, 2018
Luis Rodriguez\textsuperscript{1}  
Complainant

v.

Kean University\textsuperscript{2}  
Custodial Agency

Records Relevant to Complaint:

\textbf{1\textsuperscript{st} OPRA Request}  
“I request a copy of all November 2014 to January 2015 bank statements for the bank accounts of Kean University [\textquotedblleft Kean\textquotedblright].”

\textbf{2\textsuperscript{nd} OPRA Request}  
“I request a copy of all check deposits (either individual deposits or a list of the them – for example, from a bank account register) made during November 2014 to January 2015 into all the bank accounts of Kean.”

\textbf{Custodian of Record:} Laura Barkley-Haelig  
\textbf{Response Made by Custodian:} December 21, 2015

\textbf{Response Made by Custodian:} January 8, 2016; January 22, 2016; February 5, 2016; February 19, 2016; March 4, 2016; March 17, 2016

\textbf{GRC Complaint Received:} March 24, 2016

\textbf{Background}\textsuperscript{3}

\hspace{1cm} Request and Response:

On December 20, 2015, the Complainant submitted two (2) Open Public Records Act (\textquotedblleft OPRA\textquotedblright) requests to the Custodian seeking the above-mentioned records. On January 8, 2016, the Custodian responded in writing, seeking an extension of time to respond to the Complainant’s requests to until January 22, 2016. The Custodian then sought additional extensions of time on January 22, 2016, February 5, 2016, February 19, 2016, March 4, 2016, and March 17, 2016.

\textsuperscript{1} No legal representation listed on record.  
\textsuperscript{2} Represented by Jennifer McGruther, DAG.  
\textsuperscript{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 March 24, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that since filing his initial requests, the Custodian has repeatedly extended the time to respond, without sufficient explanation. Moreover, the Complainant argued that the Custodian neither consulted with him nor sought his permission when announcing the extensions.

The Complainant argued that by repeatedly extending the time to respond without explanation or providing a means for accommodation, the Custodian violated OPRA’s requirement that responses to requests must be within a reasonable time. See N.J.S.A. 47:1A-5(g).

Statement of Information:

On April 27, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on December 21, 2015. Because they were received on the same date, the Custodian certified that she processed both requests simultaneously. The Custodian then certified that as a result of the holiday break, the requests were not forwarded to the Budget Office until January 5, 2016. The requests were then forwarded to the Office of General Accounting (“OGA”). The Custodian certified that relevant documents were identified by the OGA, but the request for “check deposits” were referred to the Office of Student Accounting (“OSA”) for further research. However, since the OSA had not provided any records by January 8, 2016, the Custodian sought an extension of time.

The Custodian certified that a follow-up e-mail was sent to OSA on January 21, 2016. The OAL responded via telephone with some additional information on the request for “check deposits.” The Custodian then certified that on January 22, 2016 she sent another extension letter to the Complainant in order to allow time to compile and review the documents for accuracy and any needed redactions. The Custodian certified that the number of relevant documents received in response to the requests totaled approximately 700 pages. The Custodian certified that each document required significant redactions to protect exempt material including bank account numbers, wire transfer information, student and personnel social security numbers, and other personally identifying information. Therefore, the Custodian certified that additional extension letters were sent between March 4, 2016 and April 14, 2016 to allow for the time needed to make these redactions.

The Custodian certified that on April 27, 2016, 679 pages of records were provided to the Complainant via e-mail in response to his OPRA requests. Specifically, the Custodian provided 221 pages of records pertaining to the 1st OPRA request, with redactions made pursuant to N.J.S.A. 47:1A-1.1(6) and N.J.S.A. 47:1A-1(24). For the 2nd OPRA request, the Custodian provided 458 pages of records, with redactions made pursuant to N.J.S.A. 47:1A-1.1(6) & (16), N.J.S.A. 47:1A-1(24), and FERPA.

The Custodian initially argued that since the Complainant has the requested records, the matter is not moot and should be dismissed. See Mason v. City of Hoboken, Docket No. A-0508-
Regarding the requests, the Custodian stated that Kean has multiple bank accounts, and the Custodian located approximately 700 pages of relevant documents. Subsequently, the Custodian worked with the accounting department to ensure that bank account numbers, or other confidential information were redacted. Additionally, the Custodian asserted that other redactions were made to confidential student or personnel information, in accordance with the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99 (FERPA). The Custodian stated that every record had to be read with extensive detail to ensure that any of the above information was properly redacted.

The Custodian argued that extensions of time to respond to OPRA requests are appropriated 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 the instant matter, the Custodian argued that both requests required an extensive search across multiple bank accounts over a period of several months. The Custodian also argued that she endeavored to locate and identify the records and kept the Complainant apprised of the requests’ status.

In addition to the arguments set forth under Item 12, the Custodian certified as to the number of OPRA requests received by the Complainant in a 3½ year span. The Custodian certified that in that period she has received 369 OPRA requests from the Complainant and described them generally as being multi-part and complex. In addition to the OPRA requests, the Custodian certified that she was also handling Denial of Access Complaints filed by the Complainant during that period.

Additional Submissions

On May 17, 2016, the Complainant responded to the Custodian’s April 27, 2016 response to his request, arguing that a delay of nearly four (4) months later is too long and not timely. Additionally, the Complainant noted that the Custodian did not include a Vaughn index to accompany the redacted records. Lastly, the Complainant noted that provided payroll account records have the employee’s names redacted. The Complainant argued that the redactions are a violation of N.J.S.A. 47:1A-10’s provisions which allow for disclosure of an employee’s name, salary, and payroll information, among other data.
The Complainant also asked that Kean write out the exemptions claimed for redactions regarding the OPRA requests, rather than by number to avoid confusion over what specific exemptions are being asserted.

**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).

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 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 (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 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).

In the instant matter, the Custodian sought multiple extensions for the Complainant’s December 21, 2015 OPRA requests as follows:

<table>
<thead>
<tr>
<th>Date of Request for Extension</th>
<th>New Deadline for Response</th>
<th>Reason for Extension</th>
</tr>
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<tbody>
<tr>
<td>January 8, 2016</td>
<td>January 22, 2016</td>
<td>So that the OPRA request may “be appropriately processed.”</td>
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<tr>
<td>January 22, 2016</td>
<td>February 5, 2016</td>
<td>So that the OPRA request may “be appropriately processed.”</td>
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<tr>
<td>February 5, 2016</td>
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<td>So that the OPRA request may “be appropriately processed.”</td>
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<tr>
<td>February 19, 2016</td>
<td>March 4, 2016</td>
<td>So that the OPRA request may “be appropriately processed.”</td>
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<tr>
<td>March 4, 2016</td>
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<td>So that the OPRA request may “be appropriately processed.”</td>
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<tr>
<td>March 17, 2016</td>
<td>March 31, 2016</td>
<td>So that the OPRA request may “be appropriately processed.”</td>
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<tr>
<td>March 31, 2016</td>
<td>April 14, 2016</td>
<td>So that the OPRA request may “be appropriately processed.”</td>
</tr>
<tr>
<td>April 14, 2016</td>
<td>April 27, 2016</td>
<td>So that the OPRA request may “be appropriately processed.”</td>
</tr>
</tbody>
</table>

The subject OPRA requests sought bank statements and check deposits for all of Kean’s bank accounts over three (3) month period. The Custodian extended the response time on eight (8) occasions for approximately 76 business days, accounting for public holidays. 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.\footnote{“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.} Id. Although the Custodian does not require permission to extend the time to respond to an OPRA request, the 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.

In the instant matter, the Custodian has met her burden. Although the extensions were numerous, they are a fraction compared to the nineteen (19) extensions made in Rodriguez, GRC 2015-77. Additionally, the Custodian’s SOI adequately explains why fulfilling the request necessitated the extensions. Specifically, the Custodian identified the number of agencies she needed to confer with to locate the records, and the total number of records (700) compiled prior to review. The Custodian also adequately described the actions taken to keep up to date on the status of the requests. Furthermore, the approximately seven (7) weeks taken to review the 700 pages of bank statements and check deposits for redactions, coping, and scanning was reasonable, when considering the nature and sensitivity of the information normally contained in such information, such as account numbers, wire transfer information, student information, and social security numbers.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant’s December 21, 2016 OPRA requests. N.J.S.A. 47:1A-6. 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 Rodriguez, GRC 2015-77.

**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.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council\footnote{Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).} that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

> [OPRA] also contemplates the GRC’s in camera review of the records that an agency asserts are protected when such review is necessary to a determination of
the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit in camera review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct in camera review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of in camera review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian argued produced 679 pages responsive records to the Complainant’s OPRA request. In her SOI, the Custodian stated that the redactions made to some of the records were identifying information, social security numbers, and account numbers. However, the Complainant argued that of the total production, the payroll records redacted the names of employees, which should be disclosed under N.J.S.A. 47:1A-1(10).

Accordingly, the GRC must conduct an in camera review of the responsive records to validate the Custodian’s assertion that the redactions contained in the portion of the responsive records pertaining to payroll documents were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See Paff, 379 N.J. Super. at 346, N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-1(10).

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.
2. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian’s assertion that the payroll records were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See *Paff v. NJ Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

3. The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) unredacted copies of the payroll portion of the records responsive to the request, a document or redaction index listing each of the responsive records⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

April 17, 2017

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⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

*Luis Rodriguez v. Kean University, 2016-86 – Findings and Recommendations of the Council Staff*