



**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**

**June 30, 2020 Government Records Council Meeting**

Luis F. Rodriguez  
Complainant  
v.  
Kean University  
Custodian of Record

Complaint No. 2018-112

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 Supplemental 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 Council dismiss this complaint because the Complainant withdrew it in writing via e-mail on June 18, 2020. Therefore, no further adjudication is required.

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 30<sup>th</sup> Day of June 2020

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: July 2, 2020**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 30, 2020 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-112**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of “any/all” purchase orders and checks made out to Gourmet Dining (“Gourmet”) from 2014 to present.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** April 23, 2018  
**Response Made by Custodian:** Various  
**GRC Complaint Received:** June 15, 2018

**Background**

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the January 21, 2020 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, found that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on warranted and substantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018). 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 may have unlawfully denied access to purchase orders and/or checks responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that at least some checks existed prior to the submission of the subject OPRA request. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those checks and purchase orders located, 2) provide a lawful basis for any purchase orders or checks located that the Custodian

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

<sup>2</sup> Represented by Kraig M. Dowd, Esq. of Weber, Dowd Law, LLC. (Woodland Park, NJ).

- believes are exempt from disclosure; and/or 3) certify if no additional responsive records existed and the reason therefor. The GRC notes that the Custodian is not required to disclose those checks from 2014 and 2015 because the Complainant admitted that he already possessed them at the time of his OPRA request. Bart v. Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>3</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
  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 February 28, 2020, the Council distributed its Interim Order to all parties. On March 6, 2020, Custodian's Counsel e-mailed a letter to the Government Records Council ("GRC") attaching a legal certification from the Custodian. Counsel stated that the Custodian acknowledges that she inadvertently failed to identify the existence of some responsive records. Custodian's Cert. ¶ 12-13. Counsel noted however that the Custodian did not unlawfully deny access to those records because the Complainant possessed them at the time of the OPRA request. Bart, 403 N.J. Super. at 618.

Counsel additionally stated that Kean University Foundation ("Foundation") advised that it would be unable to forward a response to the Custodian until March 13, 2020. Counsel thus requested an extension of time until that date to respond to the Interim Order.

Counsel finally argued that the Custodian's actions in this complaint were not knowing and willful. Doe v. Twp. of Toms River (Ocean), GRC Complaint No. 2017-56 (November 2018). Counsel argued that here, the Custodian endeavored to respond to the subject OPRA request in good faith even though the Foundation was asserting that it was not subject to OPRA. Custodian's Cert. ¶ 5. Counsel further argued that the Custodian coordinated a response in the middle of the Foundation's move off-campus. Custodian's Cert. ¶ 8-9. Counsel thus argued that any non-disclosure was unintentional and beyond the Custodian's control.

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<sup>3</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>4</sup> "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."

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On March 9, 2020, the GRC e-mailed Custodian's Counsel granting the requested extension of time through March 13, 2020.

On March 13, 2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she asked the Foundation to search for and provide to her records responsive to the subject OPRA request. The Custodian certified that according to an e-mail from Senior Director Clarinda Joseph-Cumberbatch, the Foundation did not maintain copies of the actual checks.<sup>6</sup> The Custodian affirmed that the Foundation substituted the actual checks with a detailed report listing all checks issued from January 1, 2016 to the date of the clarified request. The Custodian noted that the Foundation redacted only the names of individual donors under the privacy exemption. N.J.S.A. 47:1A-1.

Additional Submissions:

On June 16, 2020, the GRC called Complainant via telephone and left a message in order to determine his position on the Custodian's response. On the same day, the Complainant e-mailed the GRC confirming receipt of the message. The Complainant asked that he be given "a few days to review" the response prior to answering the GRC. On June 18, 2020, the Complainant e-mailed the GRC advising that he wished to withdraw this complaint because Kean complied with the subject OPRA request via the Foundation.

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council dismiss this complaint because the Complainant withdrew it in writing via e-mail on June 18, 2020. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Executive Director

June 23, 2020

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<sup>6</sup> Ms. Joseph-Cumberbatch stated that she could not independently download the checks from the banking site. She further noted that they would have to submit a request directly to the bank but did not do so due to time constraints. Ms. Joseph-Cumberbatch indicated that she would attempt to obtain the physical checks if the Custodian received another extension.



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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

February 26, 2020 Government Records Council Meeting

Luis F. Rodriguez  
Complainant  
v.  
Kean University  
Custodian of Record

Complaint No. 2018-112

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on warranted and substantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018). 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 may have unlawfully denied access to purchase orders and/or checks responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that at least some checks existed prior to the submission of the subject OPRA request. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those checks and purchase orders located, 2) provide a lawful basis for any purchase orders or checks located that the Custodian believes are exempt from disclosure; and/or 3) certify if no additional responsive records existed and the reason therefor. The GRC notes that the Custodian is not required to disclose those checks from 2014 and 2015 because the Complainant admitted that he already possessed them at the time of his OPRA request. Bart v. Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>1</sup>**

<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

**certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**

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 26<sup>th</sup> Day of February 2020

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: February 28, 2020**

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<sup>2</sup> "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."

<sup>3</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2020 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-112**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of “any/all” purchase orders and checks made out to Gourmet Dining (“Gourmet”) from 2014 to present.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** April 23, 2018  
**Response Made by Custodian:** Various  
**GRC Complaint Received:** June 15, 2018

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

**Request and Response:**

On April 23, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 2, 2018, the Custodian responded in writing seeking clarification of the Complainant’s OPRA request because it failed to “identify specific records.” Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian noted that the Complainant’s failure to provide additional clarification by May 16, 2018 would result in closure of the OPRA request. On the same day, the Complainant e-mailed the Custodian clarifying that he sought “checks and purchase orders from Kean University Foundation (“Foundation”) made out to Gourmet for the specified time period.”

On May 11, 2018, the Custodian responded in writing stating that the Foundation believed it was not a “public agency” for purposes of OPRA based on its designation as a non-profit organization. The Custodian stated that notwithstanding, the Foundation chose to make a good faith attempt to respond to the subject OPRA request. The Custodian advised that that because of the time frame of records sought, a time extension until May 25, 2018 was necessary to process the OPRA request appropriately.

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

<sup>2</sup> Represented by Kraig M. Dowd, Esq. of Weber, Dowd Law, LLC. (Woodland Park, NJ).

<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.

On May 17, 2018, the Complainant e-mailed the Custodian a second clarification of the request. Therein, the Complainant stated that:

I request a copy of *all* purchase orders and/or checks made out to Gourmet Dining from 2014 to the present. I request a copy of any all purchase orders and/or checks made out to Gourmet Dining from 2014 to the present. (Emphasis in original).

On May 30, 2018, the Custodian responded in writing stating that she received the Complainant's additional clarification on May 17, 2018. The Custodian advised that that because of the time frame of records sought, a time extension until June 13, 2018 was necessary to process the OPRA request appropriately. On June 13, 2018, the Custodian responded in writing advising that that because of the time frame of records sought, a time extension until June 27, 2018 was necessary to process the OPRA request appropriately.

#### Denial of Access Complaint:

On June 15, 2018, 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 request. 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.

#### Supplemental Responses:

On June 27, 2018, the Custodian responded in writing advising that that because of the time frame of records sought, an extension until July 11, 2018 was necessary to process the OPRA request appropriately. On July 11, 2018, the Custodian responded in writing stating that neither Kean University ("Kean") nor the Foundation maintained records responsive to the Complainant's May 17, 2018 clarified OPRA request.

#### Statement of Information:

On July 17, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on April 23, 2018. The Custodian certified that she responded in writing on May 2, 2018 seeking clarification, which the Complainant provided on the same day. The Custodian affirmed that she extended the time frame to respond on May 11, 2018. The Custodian certified that thereafter, the Complainant submitted a second clarification on May 17, 2018. The Custodian affirmed that she responded in writing on May 30, 2018 extending the time frame for response while she coordinated with the Foundation. The Custodian affirmed that she extended the time frame two (2) additional times due to two (2) holidays, a reduced work schedule, legal representation transitions affecting the Foundation, and "time out of the office." The Custodian noted that the Complainant never objected to the extensions prior to submitting this complaint. The Custodian certified that she responded in writing on July 11, 2018 denying the subject OPRA request because no records existed.



The Custodian contended that her extensions were reasonable. N.J. Builders Ass'n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian contended that the subject OPRA request sought records spanning four (4) years that were not in Kean's possession. The Custodian asserted that Kean needed the additional time to coordinate with the Foundation, which was undergoing a transition period. The Custodian noted that the transition required her to contact Kean's attorney for legal advice on how to process the subject OPRA request. The Custodian contended that notwithstanding this transition and the other complications described above, she ultimately responded on July 11, 2018 denying the request because no records existed.

The Custodian also reiterated that the Complainant did not object to the extensions. The Custodian argued that instead, the Complainant "took advantage of" at least one extended time frame to clarify his OPRA request.

#### Additional Submissions:

On July 19, 2018, the Complainant disputed the Custodian's SOI certification that neither Kean nor the Foundation maintained responsive records. The Complainant stated that he was submitting screenshots of checks written to Gourmet in 2014 and 2015 that he received in response to a 2016 OPRA request.<sup>4</sup> The Complainant argued that these screenshots provide proof that the Custodian "lied" in the SOI.

The Complainant further argued that he has no doubt Kean is maintaining additional checks from 2016 to present paid to Gourmet or its subsidiaries. The Complainant pointed to a law suit filed by a vending machine company that alleged Kean terminated a contract to pay a massive debt owed to Gourmet. See Paramount Vending Serv., Corp. D.B.A. Culinary Ventures Vending v. Kean Univ., et al, Docket No. MRS-L-0324018. The Complainant contended that Kean must be paying its debt to Gourmet somehow. The Complainant argued that if Kean continued to deny the existence of responsive checks, the GRC should require them to provide supporting documentation of how its paying its debt to Gourmet.

### 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 (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:

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<sup>4</sup> The Complainant noted that he forgot he submitted said OPRA request.

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 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. N.J. 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. N.J. 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 for the Complainant's April 23, 2018 OPRA request, which he clarified on May 17, 2018. The GRC's review of the extension issue rests on those extensions following the Complainant's second clarification; however, it should be noted that the Custodian obtained an initial extension between the first and second clarification.

The Custodian’s extensions are as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
May 30, 2018	June 13, 2018	So that the OPRA request may “be appropriately processed.”
June 13, 2018	June 27, 2018	So that the OPRA request may “be appropriately processed”
June 27, 2018	July 11, 2018	So that the OPRA request may “be appropriately processed”

The Custodian extended the response time on three (3) occasions for a total of approximately twenty-nine (29) business days, accounting for public holidays and closures. As noted above, a requestor’s approval is not required for a valid extension. However, it should be noted that the Complainant did not object to any extension prior to filing this complaint.

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.

Regarding the request, the Complainant sought “all purchase orders and/or checks” made out to Gourmet, spanning over more than a four (4) year period. In the SOI, the Custodian explained Kean’s search, which involved coordinating with the Foundation to try and locate responsive records. A potential stressor on the need for additional extensions was the loss of time due to holidays and a “reduced” work schedule, as well as other factors set forth in the SOI. The Custodian ultimately responded advising that no records existed.

From the Custodian’s receipt of the Complainant’s second clarification, she initially sought ten (10) business days to respond. The Custodian then sought two (2) additional extensions comprising approximately nineteen (19) business days. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of nearly one (1) full months of business days.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decisions in Rodriguez v. Kean Univ., GRC Complaint No. 2015-312 (March 2017) and Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018) for a comparison. In Rodriguez, GRC 2015-312, 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. In Rodriguez, GRC 2016-196, the Council found the facts to be distinguishable from Rodriguez, GRC 2015-312 and determined that

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<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*.

the extensions were reasonable. In reaching its conclusion, the Council reasoned that the request there required a more significant search. The Council also found that the Custodian's early response coming four (4) days before the end of the extended time frame as compelling evidence that the extension was reasonable.

The GRC sees the facts here as more on point with Rodriguez, GRC 2016-196. Specifically, the Custodian sought ten (10) fewer business days than in Rodriguez, GRC 2015-312, and the length of time needed to reach a conclusion that no records existed was reasonable. Moreover, and like the search outlined in Rodriguez, GRC 2016-196, the Custodian was required to coordinate with the Foundation to determine the existence of responsive records. This search coincided with several additional factors, including holidays, work schedules, and transitions occurring in the Foundation. Thus, based on the evidence of record, the GRC 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 based on warranted and substantiated extensions. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. See also Rodriguez, GRC 2016-196. 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).

### **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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Additionally, the Appellate Division has held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Bart v. Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). The Appellate Division noted that "requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not . . . advance the purpose of OPRA, which is to ensure an informed citizenry." Bart, 403 N.J. Super. at 618 (citations omitted). The Appellate Division's decision in Bart, however, turns upon the specific facts of that case. The Court stated it was "undisputed that Bart at all times had within his possession a copy of [the requested record] . . . Indeed, he attached a copy to the complaint he filed with the Council." Id. (emphasis supplied). Similarly, the Council has held that when a complainant admits that they were in possession of the requested record at the time he made the request, it is not a denial of access if the custodian failed to provide another copy. Rodriguez v. Kean Univ., GRC Complaint No. 2014-121 (October 2014). See also Owoh (on behalf of O.R.) v. West-Windsor Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (February 2013).

In this matter, the Custodian responded to the Complainant's OPRA request stating that no responsive records existed. The Custodian also certified to this position in the SOI. However, following the SOI, the Complainant disputed the Custodian's certification that no records existed. Notably, the Complainant argued that he received 2014 and 2015 checks made payable to Gourmet in response to an OPRA request in 2016. The Complainant included screen shots of those checks to his submission. The Complainant also attached a 2017 agreement between Kean and Gourmet for vending services and a 2018 lawsuit filed against Kean involving its business relationship with Gourmet.

Having reviewed the submissions of the parties, the GRC is not satisfied that the evidence of record supports a finding consistent with Pusterhofer. Specifically, the Complainant provided sufficient information to prove that, at least in 2016, Kean maintained responsive checks from 2014 and 2015. Further, the Complainant provided competent evidence showing a continued business relationship between Kean and Gourmet through at least 2017. Based on this, the GRC cannot definitively state that the Custodian's response was accurate.

Accordingly, the Custodian may have unlawfully denied access to purchase orders and/or checks responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that at least some checks existed prior to the submission of the subject OPRA request. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those checks and purchase orders located, 2) provide a lawful basis for any purchase orders or checks located that the Custodian believes are exempt from disclosure; and/or 3) certify if no additional responsive records existed and the reason therefor. The GRC notes that the Custodian is not required to disclose those checks from 2014 and 2015 because the Complainant admitted that he already possessed them at the time of his OPRA request. Bart, 403 N.J. Super. at 618.

### **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 Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on warranted and substantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). See also Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018). 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 may have unlawfully denied access to purchase orders and/or checks responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the

evidence of record indicates that at least some checks existed prior to the submission of the subject OPRA request. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those checks and purchase orders located, 2) provide a lawful basis for any purchase orders or checks located that the Custodian believes are exempt from disclosure; and/or 3) certify if no additional responsive records existed and the reason therefor. The GRC notes that the Custodian is not required to disclose those checks from 2014 and 2015 because the Complainant admitted that he already possessed them at the time of his OPRA request. Bart v. Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
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: Frank F. Caruso  
Executive Director

January 21, 2020<sup>9</sup>

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<sup>6</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>7</sup> "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."

<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>9</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.