



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2018-53

v.

Kean University
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request within the given extension period which ended February 21, 2018. N.J.S.A. 47:1A-6. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days, or in this case a reasonably necessary extension thereof, resulted 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (January 2010); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (October 2007). However the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on April 19, 2018.
2. The Custodian failed to respond to the Complainant’s OPRA request prior to the last day of an extension, 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 April 19, 2018. 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 7th Day of January 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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2018-53

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Copies of all invoices submitted to the Kean University Foundation (“KUF”) by Gourmet Dining or its parent company and/or subsidiaries for the years 2012 to the present.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: November 11, 2017
Response Made by Custodian: April 19, 2017
GRC Complaint Received: March 27, 2018

Background³

Request and Response:

On November 11, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On November 22, 2017, the Custodian responded in writing, advising that an extension until December 6, 2017, was necessary to process the OPRA request appropriately. On December 6, 2017, the Custodian responded in writing, advising that an extension until December 20, 2017, was necessary to process the OPRA request appropriately. On December 20, 2017, the Custodian responded in writing, advising that an extension until January 10, 2018, was necessary to process the OPRA request appropriately. The Custodian noted that this extension was also necessary due to Kean University’s (“Kean”) upcoming holiday closure.

On January 10, 2018, the Custodian responded in writing, advising that an extension until January 24, 2018, was necessary to process the OPRA request appropriately. On January 24, 2018, the Custodian responded in writing, advising that an extension until February 7, 2018, was

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

necessary to process the OPRA request appropriately. On February 7, 2018, the Custodian responded in writing, advising that an extension until February 21, 2018, was necessary to process the OPRA request appropriately. On February 23, 2018, the Custodian responded in writing, advising that an extension until March 9, 2018, was necessary to process the OPRA request appropriately. On March 12, 2018, the Custodian responded in writing, advising that an extension until March 26, 2018, was necessary to process the OPRA request appropriately. On March 26, 2018, the custodian responded in writing advising that an extension until April 9, 2018 was necessary to process the OPRA request appropriately.⁴

Denial of Access Complaint:

On March 27, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by not providing the requested records in a timely manner. The Complainant argued that the Custodian did not “identify any mitigating circumstances in her reply.” The Complainant asserted that the Custodian did not set a firm date for disclosure. The Complainant further asserted that the extensions were “particularly egregious” because invoices are subject to immediate access under OPRA.

Supplemental Response:

On April 9, 2018, the Custodian responded in writing, advising that an extension until April 24, 2018, was necessary to process the OPRA request appropriately. On April 19, 2018, the Custodian responded to the Complainant in writing, disclosing 255 pages of responsive records.

Statement of Information:

On April 27, 2018, the Custodian filed a SOI. The Custodian certified that KUF received the Complainant’s OPRA request on November 11, 2017. The Custodian certified that the Complainant’s OPRA request was not forwarded to her office until November 17, 2017. The Custodian cited Internal Revenue Service Code 501(c) (3) asserting that KUF is a separate incorporated entity, not subject to OPRA. The Custodian asserted that that Kean “. . . did not make, maintain, file or receive copies of the requested records.”

The Custodian asserted that she forwarded the OPRA request for legal review and ultimately it was determined that Kean would work with KUF to provide the responsive records. The Custodian further asserted that the Complainant’s OPRA request sought records spanning over a five (5) year period that were not in the possession of the University, requiring her to work with the KUF “in order to acquire the records, review them for responsiveness and redactions and ultimately furnish them to the Complainant.”

Additionally, the Custodian asserted that the Complainant’s OPRA request sought all invoices by Gourmet Dining to KUF that spanned a five year period. The Custodian argued that

⁴ It appears that this particular request for extension was listed, though the document was not included in the Custodian’s Statement of Information (“SOI”).

OPRA requires that “immediate 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.” N.J.S.A. 47:1A-5(e) (emphasis added). The Custodian asserted that the wording of the statute implied that there may be circumstances where immediate access is not possible. The Custodian stated that “. . . [d]espite this fact, [she] responded to the Complainant on the Foundation’s behalf and ultimately provided records responsive to his request on April 19, 2018.”

The Custodian averred that she responded to the Complainant’s OPRA request in a reasonable time period. The Custodian cited N.J. Builder’s Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178 (App. Div. 2007) asserting that “[t]here is an obvious connection between the specificity of the request and a custodian’s ability to provide a prompt reply.”

The Custodian further averred that because the records sought were provided to the Complainant, his denial of access complaint is now moot. Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, (App. Div. 2008) (slip op. at 7).

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ 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 dated October 31, 2007).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by

⁵ 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.

the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

In the matter before the Council, the Custodian sought an extension of time to respond to the Complainant’s OPRA request through February 21, 2018. However, the Custodian did not respond again until February 23, 2018. In the SOI, the Custodian certified to these facts. Based on the forgoing and the Council’s decision in Kohn, GRC 2007-124, the Custodian’s failure to respond prior to the expiration of the extended time frame resulted in a “deemed” denial.

Therefore, the Custodian did not bear her burden of proof that she timely responded 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 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11; Kohn, GRC 2007-124. However, the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on April 19, 2018.

Finally, the GRC notes it does not address whether the extensions in their totality were reasonable and substantiated because the Complainant’s OPRA request was “deemed” denied as of the filing of this complaint.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA] and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA] and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95); 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 prior to the last day of an extension, 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 April 19, 2018. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request within the given extension period which ended February 21, 2018. N.J.S.A. 47:1A-6. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days, or in this case a reasonably necessary extension thereof, resulted 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (January 2010); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (October 2007). However the Council need not order disclosure of the requested record because the Custodian disclosed the record to the Complainant on April 19, 2018.
2. The Custodian failed to respond to the Complainant's OPRA request prior to the last day of an extension, 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 April 19, 2018. 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: Brandon Garcia
Case Manager

December 10, 2019