



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 30, 2021 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2019-252

v.

Kean University
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 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 portions of the Complainant’s October 9, 2019 clarified OPRA requests based on unwarranted and unsubstantiated 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). 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 a reasonably necessary extension thereof, results in a “deemed” denial of the remainder of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian did not unlawfully deny access to the Complainant’s clarified OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant with all records responsive to the clarified OPRA request. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
3. The Custodian’s failure to timely respond based on unwarranted and unsubstantiated extensions resulted in a “deemed” denial of access. However, the Custodian disclosed all responsive records to the Complainant on January 21, 2020. Additionally, 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 do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of March 2021

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 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2019-252

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all correspondence” between Kean University (“Kean”) and the Council for the Accreditation of Educator Preparation (“CAEP”) regarding actions taken at a April 30, 2018 meeting, including “*any correspondence telling Kean of the action*” and reports between them about the action, from February 2018 to the present. (Emphasis in original).

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: September 25, 2019
Response Made by Custodian: October 4, 2019
GRC Complaint Received: December 20, 2019

Background³

Request and Response:

On September 25, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 4, 2019, the Custodian responded to the Complainant in writing denying the subject OPRA request as invalid because it failed to identify specific government records. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian thus sought clarification of the Complainant’s OPRA request by close of business on October 11, 2019.

On October 9, 2019, the Complainant clarified the subject OPRA request to seek electronic copies via e-mail of “all correspondence” from CAEP sent to Kean regarding the most recent accreditation status of Kean’s Teacher Preparation Unit from 2018 to present.

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Webber Dowd Law, LLC (Woodland Park, NJ).

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.

On October 18, 2019, the Custodian responded in writing stating that an extension of time to respond through November 29, 2019 is necessary to appropriately process the subject OPRA request. On November 27, 2019, the Custodian responded in writing stating that an extension of time to respond through December 18, 2019 is necessary to ensure that an exhaustive search has been completed. On December 18, 2019, the Custodian responded in writing stating that an extension of time to respond through January 22, 2020 is necessary to ensure that an exhaustive search and review has been completed.

Denial of Access Complaint:

On December 20, 2019, 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 noted that “some, if not all of the extensions” were more than two (2) weeks.

Supplemental Response:

On January 21, 2020, the Custodian responded in writing disclosing thirteen (13) pages of records to the Complainant.

Statement of Information:

On January 28, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 9, 2019. The Custodian certified that she sent the subject OPRA request to multiple “Offices of Record” for review. The Custodian affirmed that on October 10, 2019, one of the offices advised that no records existed. The Custodian certified that because she was awaiting additional responses from other offices, she responded in writing obtaining extensions of time on October 18 and November 27, 2019. The Custodian affirmed that she received potentially responsive records in early December and followed up with all offices to ensure that a complete search was conducted. The Custodian noted that she obtained an additional extension on December 18, 2019 to review and redact the records, where applicable. The Custodian affirmed that she responded in writing on January 21, 2020 disclosing thirteen (13) pages of records.

The Custodian contended that her extensions were reasonable based on the circumstances surrounding the subject OPRA request. N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Rodriguez v. Kean Univ., GRC Complaint No. 2016-196 (February 2018). The Custodian averred that here, key vacancies in the “Offices of Record” and the pending holiday break played a role in the extensions. The Custodian also noted that the complexity of the Complainant’s OPRA request, which sought correspondence over nearly two (2) years between multiple indeterminate faculty members, required reasonable extensions.

The Custodian additionally contended that no unlawful denial of access occurred because she disclosed responsive records within the final extended deadline. See Desoto v. City of Bayonne (Hudson), GRC Complaint No. 2012-243 (July 2013).

Additional Submissions:

On January 30, 2020, the Complainant submitted a rebuttal to the SOI via e-mail. Therein, the Complainant contended that the Custodian failed to disclose to him all responsive records. The Complainant asserted that the records disclosed identified at least one (1) report Kean sent to CAEP but did not provide it. The Complainant contended that while Kean may argue that he “asked for correspondence and that is what” they disclosed, he believes the term “correspondence” should be more expansive in the spirit of OPRA’s legislative intent. The Complainant contended that his position is supported by the definition of “correspondence” found on the online version of Black’s Law Dictionary.⁴ The Complainant thus posited that the report should have been considered “correspondence” responsive to the subject OPRA request.⁵

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).”

⁴ <https://dictionary.thelaw.com/correspondence/> (accessed December 31, 2020).

⁵ In a subsequent e-mail, the Complainant contended that his original OPRA request was valid. The Complainant argued that the only reason he submitted clarification was to expedite the disclosure of responsive records. However, the GRC will not address the validity of the Complainant’s original OPRA request because: 1) he clarified it of his own volition; 2) he identified the clarified OPRA request as the subject of this complaint; and 3) he failed to challenge the validity issue as part of the original complaint or in a formal amendment pursuant to N.J.A.C. 5:105-2.3(h)(1).

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. 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 October 9, 2019 clarified OPRA request. The Custodian’s extensions are as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
October 18, 2019	November 29, 2019	So that the OPRA request may “be appropriately processed.”
November 27, 2019	December 18, 2019	To ensure an “exhaustive search has been completed”
December 18, 2019	January 22, 2020	To “finalize an exhaustive search and to review documents for responsiveness and redactions.”

The Custodian extended the response time on three (3) occasions for a total of approximately fifty-nine (59) 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.⁶ Id.

Regarding the request, the Complainant's clarified request sought "all correspondence" from CAEP to Kean regarding the most recent accreditation status of Kean's Teacher Preparation Unit for a time period spanning a year and approximately ten (10) months. In the SOI, the Custodian explained Kean's search, which involved coordinating with multiple "Office[s] of Record" to locate and produce potentially responsive records. A potential stressor was the number of vacancies within Kean, as well as the need for additional extensions was the loss of time due to holidays. The Custodian ultimately responded on January 21, 2020 disclosing thirteen (13) pages of records.

From the Custodian's receipt of the Complainant's clarification, she initially sought twenty-eight (28) business days to respond. The Custodian then sought two (2) additional extensions comprising approximately thirty-one (31) business days. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of nearly two (2) full months of business days.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2016-87 (April 2018) for comparison. In that case, the Council held that the Complainant's request for "Public Access Files" held by Kean warranted an extension of forty-four (44) business days, as the request produced 437 pages of records that needed to be reviewed for potential redactions. The Council held that the extensions were not unduly excessive based on the totality of the circumstances.

The GRC sees the facts here as distinguished from Rodriguez, GRC 2016-87. Specifically, the Custodian sought fifteen (15) more business days than in Rodriguez, GRC 2016-87, yet disclosed far fewer records. The GRC recognizes that the search conducted here may have been similar to that in Rodriguez, each with its own level of difficulty in amassing and obtaining records. The search certainly coincided with several additional factors, including holidays and staffing vacancies. Notwithstanding, the evidence of record here, especially the number of responsive records disclosed, persuades the GRC that extending the response time for the OPRA request to the extent demonstrated in the instant matter was excessive.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's October 9, 2019 clarified OPRA requests based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or

⁶ "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*.

denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the remainder of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and 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.

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015). However, in Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019), the Council held that evidence contained in the record suggested that additional responsive records may exist. Based on this, the Council ordered the Custodian to perform another search and submit a certification regarding the results of that search.

In the matter before the Council, the Complainant clarified his OPRA request on October 9, 2019 for which the Custodian disclosed records through via e-mail. The Complainant filed the instant complaint challenging the Custodian’s extensions. In the SOI, the Custodian argued in support of her extensions and certified that she disclosed thirteen (13) pages of records to the Complainant on January 21, 2020. In response to the SOI, the Complainant argued that the Custodian failed to disclose all responsive records. In support of his argument, the Complainant noted that a disclosed e-mail mentioned “at least one report” that Kean sent to CAEP. The Complainant argued that this report, as well as others that may exist, should be considered “correspondence” responsive to his OPRA request based on a definition contained within Black’s Law Dictionary.

Upon review of the submissions and evidence presented here, the GRC is persuaded that this complaint is similar to Danis, GRC 2009-156 and can be distinguished from Macek, GRC 2017-156. Specifically, the Complainant sought “correspondence” and not “reports” in his clarified request; thus, the argument that the referenced report or other potentially responsive reports was responsive to the instant OPRA request is incorrect.⁷

Correspondence can best be described as letters, memoranda, e-mails, text messages and other similar communications. Such a colloquial understanding is supported by the Black’s Law Dictionary definition of “correspondence,” which is “an interchange of written communications .

⁷ The GRC notes that “reports” was a component of his original OPRA request, but he did not include the term in his clarified OPRA request.

. . . [t]he letters written by a person and the answers written [back].”⁸ A “report,” on the other hand, is a specific type of document containing an “official or formal statement of facts.” Indeed, it is telling that the Complainant chose not to include the Black’s Law Dictionary definition for “report” in his argument because it relates to Legislative or court filings.⁹ The aforementioned basic understanding of the differences between the terms “correspondence” and “report” is better supported by the Merriam-Webster definitions of each word. That is, the term “correspondence” is defined as “a communication by letters or e-mail;”¹⁰ whereas a “report” is defined as “usually detailed account or statement,” “an account or statement of a judicial opinion or decision,” or “a usually formal record of the proceedings of a meeting or session.”¹¹ Based on the foregoing, the GRC declines to expand the definition of “correspondence” to include “reports” and finds that the evidence of records supports the disclosure of all responsive records.

Therefore, the Custodian did not unlawfully deny access to the Complainant’s clarified OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant with all records responsive to the clarified OPRA request. Danis, GRC 2009-156, *et seq.*; Burns, 2005-68; Holland, 2014-63, *et seq.*

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

⁸ See FN 4.

⁹ <https://dictionary.thelaw.com/report/> (accessed March 12, 2021).

¹⁰ <https://www.merriam-webster.com/dictionary/correspondence> (accessed March 12, 2021).

¹¹ <https://www.merriam-webster.com/dictionary/report> (accessed March 12, 2021).

In the instant matter, the Custodian's failure to timely respond based on unwarranted and unsubstantiated extensions resulted in a "deemed" denial of access. However, the Custodian disclosed all responsive records to the Complainant on January 21, 2020. Additionally, 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 do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's October 9, 2019 clarified OPRA requests based on unwarranted and unsubstantiated 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). 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 a reasonably necessary extension thereof, results in a "deemed" denial of the remainder of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian did not unlawfully deny access to the Complainant's clarified OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant with all records responsive to the clarified OPRA request. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
3. The Custodian's failure to timely respond based on unwarranted and unsubstantiated extensions resulted in a "deemed" denial of access. However, the Custodian disclosed all responsive records to the Complainant on January 21, 2020. Additionally, 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 do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

March 23, 2021