



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 28, 2010 Government Records Council Meeting

William R. Dusenberry
Complainant

Complaint No. 2009-101

v.

New Jersey City University
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 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 Custodian has lawfully denied access to the requested outside activity questionnaires because they are personnel records exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10 and New Jersey City University has an obligation to safeguard from public access a citizen’s personal information when disclosure thereof would violate the citizen’s reasonable expectation of privacy. *See North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office*, 405 N.J.Super. 386 (App. Div. 2009).

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 28th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: April 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**William R. Dusenberry¹
Complainant**

GRC Complaint No. 2009-101

v.

**New Jersey City University²
Custodian of Records**

Records Relevant to Complaint: Copy of the “outside activity” ethics forms for the following New Jersey City University (“NJCU”) employees:

- (1) Academic Dean Liza Fiol-Matta
- (2) President Carlos Hernandex
- (3) Vice President Joann Bruno, Esq.
- (4) Assistant to the President, Gayle Ford
- (5) Vice President Alene Grahnam
- (6) University OPRA Officer Alfred Ramey

Request Made: March 9, 2009³

Response Made: March 18, 2009

Custodian: Alfred Ramey, Board Administrator

GRC Complaint Filed: March 30, 2009⁴

Background

March 9, 2009

Complainant’s Open Public Records Act (“OPRA”) requests. The Complainant requests the records relevant to this complaint listed above on six (6) separate official OPRA request forms.

March 18, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s six (6) OPRA requests on the seventh (7th) business day following receipt of such requests. The Custodian states that access to the requested records is denied because the requested outside activity questionnaire filed by an individual University employee is not a “government” record for purposes of OPRA pursuant to

¹ No legal representation listed on record.

² Represented by DAG Sara T. Darrow, on behalf of the NJ Attorney General.

³ While the Complainant dated the six (6) OPRA request forms March 5, 2009, the Custodian certified receiving all of them on March 9, 2009.

⁴ The GRC received the Denial of Access Complaint on said date.

N.J.S.A. 47:1A-10. Further, the Custodian states that the requested records are personnel records and are not available for public access. Lastly, the Custodian states that the University has the responsibility and obligation to safeguard from public access a citizen's personal information with which it has been entrusted.

March 30, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's six (6) OPRA requests dated March 5, 2009
- Letter from the Custodian to the Complainant dated March 18, 2009

The Complainant states that he submitted six (6) OPRA requests for the records relevant to this complaint which were all denied by the Custodian. Further, the Complainant asserts that he subsequently spoke with the legal counsel to the NJ State Ethics Commission (Mr. Jeffrey Stollman) who informed the Complainant that the Appellate Division rendered a decision requiring a balancing of the public's right to know against the possibility of the citizen whose personal information is contained in the government records at issue being harmed by the disclosure of the record in accordance with an OPRA request. Further, the Complainant concludes that upon his review of the Custodian's cited provision of OPRA (N.J.S.A. 47:1A-10), he can find no legitimate reason for the Custodian's denial of access to the requested records.

The Complainant agrees to mediate this complaint.

April 21, 2009

Offer of Mediation sent to the Custodian.

April 24, 2009

The Custodian agreed to mediate this complaint.

May 4, 2009

Complaint referred to mediation.

September 25, 2009

Complaint referred back to the GRC for adjudication of the matter.

November 16, 2009⁵

Request for the Statement of Information ("SOI") sent to the Custodian.

December 3, 2009

Custodian's SOI with the following attachments:

- Complainant's six (6) OPRA requests dated March 5, 2009
- Letter from the Custodian to the Complainant dated March 18, 2009

⁵ The Custodian's Counsel requested and was granted an extension of time to submit the SOI until December 4, 2009.

- Blank copy of the NJCU Outside Activity Questionnaire

The Custodian certifies that the requested records are filed with the University Ethics Liaison Office (“UELO”). The Custodian further certifies that he searched the outside activity questionnaires filed with the UELO between March 3, 2009 and March 18, 2009. Additionally, the Custodian certifies that because all individuals whose questionnaires were requested are currently employed with the University none have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) which requires their retention for six (6) years following separation from employment.

The Custodian certifies receiving the Complainant’s six (6) OPRA requests on March 9, 2009. The Custodian also certifies that he responded to the Complainant’s six (6) OPRA requests in writing on the seventh (7th) business day following receipt of the requests denying access to all records. The Custodian certifies that he denied access because the requested outside activity questionnaires are not government records for purposes of OPRA pursuant to N.J.S.A. 47:1A-10 because they are personnel records and the University has the responsibility and obligation to safeguard from public access a citizen’s personal information with which it has been entrusted.

Additionally, the Custodian’s Counsel submits the following legal arguments in support of the NJCU’s position. Counsel asserts that New Jersey courts have considered the issue of outside activity questionnaires’ disclosure under OPRA and decided that such records are exempt as personnel records pursuant to N.J.S.A. 47:1A-10. Specifically, Counsel asserts that in North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office, 405 N.J.Super. 386 (App. Div. 2009), the Appellate Division upheld the trial court’s conclusion that outside activity questionnaires are personnel records exempt from disclosure. Counsel asserts that the court noted that certain personnel information is available to the public under OPRA. Counsel further asserts that the only public personnel information contained in the outside activity questionnaires are employee name, title and position. Additionally, Counsel asserts that the Custodian was not required to provide the requested records with everything redacted except the employees’ names, titles and positions because the requestor already knows this information and actually included same in his OPRA requests. Counsel also asserts that the guidance provided by the GRC on its website suggests that only accessible government records require redaction and according to Counsel, personnel records are not accessible government records. Lastly, Counsel asserts that the Complainant is mistaken in his assumption that a balancing test is required to determine whether the requested records are disclosable under OPRA because such a test is only required for requests made under the common law right of access; however, the Complainant’s requests were made exclusively under OPRA.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

Additionally, OPRA provides that the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

(N.J.S.A. 47:1A-10).

The Complainant requested the outside activity questionnaires for six (6) employees of the New Jersey City University (“NJCU”) on March 9, 2009. The

Custodian responded on the seventh (7th) business day, or March 18, 2009, denying access to all records requested because the Custodian certified that outside activity questionnaires filed by University employees are exempt as personnel records for purposes of OPRA pursuant to N.J.S.A. 47:1A-10. Additionally, the Custodian certified that the University has the responsibility and obligation to safeguard from public access a citizen's personal information with which it has been entrusted. The Custodian's Counsel further asserts that the court in North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, 405 N.J.Super. 386 (App. Div. 2009), ruled on this issue when the Appellate Division upheld the trial court's conclusion that outside activity questionnaires are personnel records exempt from disclosure.

In North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, *supra*, the Appellate Division affirmed the trial court's letter opinion in which the trial court stated that after reviewing the requested approvals for outside employment of the Bergen County Prosecutor's Office ("BCPO"), it determined that the documents could not be redacted in a manner sufficient to protect the privacy interest and personal interests of the individuals and business entities therein. *Id.* at 388. The trial court concluded that the documents were personnel records exempt from disclosure and that the public interest in disclosing the information was outweighed by the individual public servant's rights to protect their privacy and security. *Id.* at 388-389. Further, the trial court submitted a memorandum, pursuant to *Rule 2:5-1(b)*, in which it noted that the question presented was whether the requested documents were properly labeled "personnel records," which are exempt from disclosure. In that memorandum, the trial court explained that while these documents may not be personnel records by name, they bear many of the indicia of personnel files because they pertain to the general subject matter of one's employment, are proffered in furtherance thereof, and are made pursuant to the employee manual. Therefore, the trial court concluded under the maxim of *ejusdem generis*⁶, these documents are of the sort that are so similar to personnel files - - if not actually personnel files - that they deserve protection as such. *Id.* at 389.

The Appellate Division specifically found that it agreed with the trial court's conclusion that the requested outside activity questionnaires qualify as personnel documents. Additionally, the Appellate Division agreed with BCPO's arguments that the outside activity questionnaire is not one of the specific items listed in N.J.S.A. 47:1A-10 as disclosable personnel information and that the BCPO has an obligation to safeguard from public access a citizen's personal information when disclosure thereof would violate the citizen's reasonable expectation of privacy. *Id.* 389-390.

The GRC finds no reason why it would not enforce the Appellate Division's decision on the issue of whether outside activity questionnaires are personnel records exempt from disclosure under OPRA. Accordingly and based on this decision, the Custodian has lawfully denied access to the requested outside activity questionnaires because they are personnel records exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10 and NJCU has an obligation to safeguard from public access a citizen's personal information when disclosure thereof would violate the citizen's reasonable expectation of privacy. *See* North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, 405 N.J.Super. 386 (App. Div. 2009).

⁶ Latin phrase meaning "of the same kind or class"; a rule of statutory construction.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has lawfully denied access to the requested outside activity questionnaires because they are personnel records exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10 and New Jersey City University has an obligation to safeguard from public access a citizen's personal information when disclosure thereof would violate the citizen's reasonable expectation of privacy. *See* North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, 405 N.J.Super. 386 (App. Div. 2009).

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010