



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**February 25, 2014 Government Records Council Meeting**

Luis Rodriguez  
Complainant

Complaint No. 2013-130

v.

Kean University  
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council (“Council”) considered the February 18, 2014 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:

1. The Custodian complied with the Council’s December 20, 2013 Interim Order because she responded in the prescribed extended time frame providing a redacted copy of the requested record, with a corresponding redaction index, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian initially failed to bear her burden of proving that she lawfully denied access to the requested record based on N.J.S.A. 47:1A-1.1, the Custodian subsequently provided the Complainant with a copy of the record and an accompanying redaction index describing the location of and statutory basis for each redaction. 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 25<sup>th</sup> Day of February, 2014

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 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February, 25 2014 Council Meeting**

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

**GRC Complaint No. 2013-130**

v.

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

**Records Relevant to Complaint:** According to its September 2012 Monitoring Report, in or around September 2012, Kean University (“University”) sent to the Middle States Commission on Higher Education (“MSCHE”) a response to two separate set (*sic*) of third party comments received by the MSCHE. I am requesting a copy of the response sent to the MSCHE.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** April 23, 2013  
**Response Made by Custodian:** May 2, 2013  
**GRC Complaint Received:** May 6, 2013

**Background**

**December 20, 2013 Council Meeting:**

At its December 20, 2013 public meeting, the Council considered the December 10, 2013 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 not borne her burden of showing that she lawfully denied the Complainant access to the requested documents. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose copies of the sought reports to the Complainant, making any necessary redactions for specific material OPRA exempts from disclosure.
2. **The Custodian shall comply with item number one (1) 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**

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

<sup>2</sup> The Custodian is represented by Deputy Attorney General Jennifer McGruther.

**redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**

3. 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 December 23, 2013, the Council distributed its Interim Order to all parties. On December 27, 2013, the Custodian requested, and was granted, an extension of time to respond until January 21, 2014. On January 21, 2014, the Custodian requested, and was granted, an additional extension of time to respond until January 24, 2014.

On January 24, 2014, the Custodian responded to the Council's Interim Order. The Custodian provided a certification stating that she was providing the requested "Response to Third Party Comments submitted to the Middle States Commission on Higher Education on August 31, 2012" that had been redacted "in accordance with the OPRA exemptions as indicated in the document index" attached. Certification of Laura Barkley-Haelig (January 24, 2014).

#### Analysis

##### Compliance

At its December 20, 2013 meeting, the Council ordered the Custodian to disclose copies of the sought reports to the Complainant, making any necessary redactions for specific material OPRA exemptions from disclosure within five (5) business days from receipt of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 23, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on December 31, 2013.

On December 27, 2013, three (3) business days after receipt of the Council's Order, the Custodian requested, and was granted, an extension of time to respond until January 21, 2014. On January 21, 2014, the Custodian requested, and was granted, an additional extension of time to respond until January 24, 2014. On January 24, 2014, the Custodian provided a redacted copy of the requested report and a detailed redaction index explaining the statutory basis or bases for each redaction made to the disclosed document.

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<sup>3</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>4</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.

Therefore, the Custodian complied with the Council's December 20, 2013 Interim Order because she responded in the prescribed extended time frame providing a redacted copy of the requested record, with a corresponding redaction index, and simultaneously provided certified confirmation of compliance to the Executive Director.

### **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 (Felder 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)).

Although the Custodian initially failed to bear her burden of proving that she lawfully denied access to the requested record based on N.J.S.A. 47:1A-1.1, the Custodian subsequently provided the Complainant with a copy of the record and an accompanying redaction index describing the location of and statutory basis for each redaction. 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 complied with the Council's December 20, 2013 Interim Order because she responded in the prescribed extended time frame providing a redacted

copy of the requested record, with a corresponding redaction index, and simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian initially failed to bear her burden of proving that she lawfully denied access to the requested record based on N.J.S.A. 47:1A-1.1, the Custodian subsequently provided the Complainant with a copy of the record and an accompanying redaction index describing the location of and statutory basis for each redaction. 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

February 18, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 20, 2013 Government Records Council Meeting

Luis Rodriguez  
Complainant

Complaint No. 2013-130

v.

Kean University  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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 has not borne her burden of showing that she lawfully denied the Complainant access to the requested documents. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose copies of the sought reports to the Complainant, making any necessary redactions for specific material OPRA exempts from disclosure.
2. **The Custodian shall comply with item number one (1) 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. 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.

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<sup>1</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>2</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.

Interim Order Rendered by the  
Government Records Council  
On The 20th Day of December, 2013

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: December 23, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 20, 2013 Council Meeting**

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

**GRC Complaint No. 2013-130**

v.

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

**Records Relevant to Complaint:** According to its September 2012 Monitoring Report, in or around September 2012, Kean University (“University”) sent to the Middle States Commission on Higher Education (“MSCHE”) a response to two separate set (*sic*) of third party comments received by the MSCHE. I am requesting a copy of the response sent to the MSCHE.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** April 23, 2013  
**Response Made by Custodian:** May 2, 2013  
**GRC Complaint Received:** May 6, 2013

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

**Request and Response:**

On April 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 2, 2013, seven (7) business days later, the Custodian responded in writing denying the request based on OPRA’s exemption of advisory, consultative, and deliberative (“ACD”) materials from disclosure. N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On May 6, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that, as part of the re-accreditation process, the MSCHE accepts comments from parties other than the institution seeking re-accreditation. The Complainant further states that the MSCHE forwards relevant

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

<sup>2</sup> The Custodian is represented by Deputy Attorney General Jennifer McGruther.

<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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

comments, which can contain information regarding the institution's ability to meet re-accreditation standards, to the institution in question so that it has an opportunity to respond.

The Complainant asserts that the MSCHE is a voluntary, non-governmental organization and, as such, not an "agency" under OPRA. The Complainant further asserts that this precludes the University from using OPRA's ACD exemption to deny access, as the requested documents cannot be either inter- or intra-agency materials. The Complainant contends that even if Kean could raise the ACD exemption, the requested documents do not qualify.

#### Statement of Information:

On June 12, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on April 23, 2013, and responded on May 2, 2013 denying access to the requested records.

The Custodian states that the GRC has looked to the deliberative process privilege when determining matters involving ACD material. Rogers v. Roxbury Bd. of Educ. (Morris), GRC Complaint Nos. 2008-267 & 2008-268 (September 30, 2009). The Custodian contends that for the privilege to apply a public entity must show that: (1) the documents were generated before the adoption of the agency's policy or position; and (2) the documents were deliberative in nature, containing opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). The Custodian further contends that such a showing results in a presumption against disclosure.

The Custodian asserts that the University's responses were pre-decisional because they were prepared in connection with the re-accreditation process and submitted to the MSCHE prior to the rendering of a decision on the University's re-accreditation application. The Custodian further asserts that the responses contained information that was deliberative in nature and used during the re-accreditation decision-making process. The Custodian additionally asserts that the Complainant has not demonstrated the compelling need for the documents necessary to overcome the presumption against disclosure. The Custodian also asserts that the responses include confidential information regarding University employees.

#### Analysis<sup>4</sup>

#### 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. For example, government records "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. 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.

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<sup>4</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

In O’Shea v. W. Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms . . . “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is predecisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies.

Id. (citing Integrity Ins. Co., 165 N.J. at 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004)); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (stating that deliberative process privilege permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of processes by which governmental decisions and policies are formulated).

The New Jersey Supreme Court ruled that a record containing or involving factual components is entitled to deliberative process protection under OPRA’s ACD exemption when the document was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process. *See* Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 280-81 (2009). In Integrity Ins. Co., the Court addressed the question of whether the Commissioner of Insurance could protect certain records from disclosure that she claimed contained opinions, recommendations, or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege, noting that the public entity asserting the privilege must make two showings regarding the material sought:

First, it must have been generated before the adoption of an agency's policy or decision. . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.

Id. at 84-85 (citations omitted).

The Court further set out procedural guidelines:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of

disclosure on frank and independent discussion of contemplated government policies.

Id. at 88 (citations omitted).

Here, the Complainant requested reports prepared by the University for the MSCHE in response to comments submitted by private third-parties regarding the University's re-accreditation efforts. While these responses are "pre-decisional" in that the University prepared them prior to being re-accredited, the decision being considered was one being made by the MSCHE. As the New Jersey Supreme Court noted, "the deliberative nature of the material sought must be functionally determined based on the document's nexus to the decision-making process and its capacity to expose the agency's deliberations during that process." Educ. Law Ctr., 198 N.J. at 297. The Custodian has not made a clear showing that the University's responses to the third-party comments reflect a deliberative process behind a pending decision to be made by the University. *See* N.J.S.A. 47:1A-1.1. In the instant matter, the decision was to be made by the MSCHE, a non-governmental agency. Additionally, the Custodian has not provided evidence to support the contention that the reports cannot be disclosed because they contain confidential employee information.

Therefore, the Custodian has not borne her burden of showing that she lawfully denied the Complainant access to the requested documents. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose copies of the sought reports to the Complainant, making any necessary redactions for specific material OPRA exempts from disclosure.

### **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 not borne her burden of showing that she lawfully denied the Complainant access to the requested documents. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose copies of the sought reports to the Complainant, making any necessary redactions for specific material OPRA exempts from disclosure.
2. **The Custodian shall comply with item number one (1) 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**

3. 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Brandon D. Minde, Esq.  
Executive Director

December 10, 2013

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<sup>5</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>6</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.