



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

November 19, 2013 Government Records Council Meeting

Luis Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2013-140

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 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 the Custodian did not unlawfully deny access under OPRA to the requested communications regarding the potential ethics sanctioning of a University employee. *See N.J.S.A. 47:1A-6.* The Complainant requested the equivalent of “personnel records” exempted under N.J.S.A. 47:1A-10, and “[t]he same legislative intent embodied in the general exemption of personnel filed from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue” here. *See North Jersey Media Group, Inc., 405 N.J. Super. 386, 389 (App. Div. 200); see also Dusenberry v. New Jersey City University, GRC Complaint No. 2009-101 (April 28, 2010).*

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 19th Day of November, 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: November 21, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-140

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “[A]ny email(s), letter(s), or other type(s) of correspondence from the Kean Ethics Liaison Officer (“ELO”) to the State Ethics Commission (“SEC”) seeking concurrence of a proposed sanction on [a Kean University employee] for ethics violation(s) related to issues brought to the attention of Human Resources and the Ethics Liaison Officer by Mr. Luis Rodriguez in 2010.”

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: February 28, 2013

Response Made by Custodian: March 11, 2013 and March 25, 2013

GRC Complaint Received: May 16, 2013

Background³

Request and Response:

On February 28, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 11, 2013, seven (7) business days later, the Custodian responded in writing seeking an extension of time to respond until March 25, 2013. On March 25, 2013, the Custodian responded denying the Complainant’s request based on OPRA’s exemptions for personnel records and records pertaining to ongoing investigations. *See N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-3(a).*

Denial of Access Complaint:

On May 16, 2013, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant states that he requested the above-referenced correspondence from the Kean University (the “University”) ELO to the SEC and did not receive the requested documents. The

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Jennifer McGrunther.

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.

Complainant asserts, instead, that he received a document from the SEC to the University's ELO.

Statement of Information:

On June 6, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on February 28, 2013 and requested an extension of time on March 11, 2013. The Custodian further certifies that she denied access on March 25, 2013.

The Custodian states that she received confirmation from the University ELO that the investigation was ongoing and, therefore, denied the request based in part on OPRA's exemption of records pertaining to an investigation in progress by a public agency. *See N.J.S.A. 47:1A-3(a)*. The Custodian also contends that the records associated with this investigation are part of the employee's personnel file and, as such, are exempt under OPRA pursuant to *N.J.S.A. 47:1A-10*. The Custodian asserts that "OPRA, as it relates to personnel records, begins with the presumption of non-disclosure and proceeds with a few narrow exceptions that would need to be considered." *Kovalcik v. Somerset Cnty. Prosecutor's Office*, 206 *N.J.* 581, 594 (2011). The Custodian states that these exceptions include summary information about an employee's position (such as a name, title, position, or salary), documents required to be disclosed by law or essential to the performance of official duties, and data that disclose conformity with specific experiential, educational or medical qualifications required for government employment. *N.J.S.A. 47:1A-10*. The Custodian asserts that no exception exists for documents relating to an employee's alleged ethics violation that may result in disciplinary action against that employee. *Citing N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office*, 405 *N.J. Super.* 386 (App. Div. 2009) (finding "outside activity" questionnaires to be personnel documents with corresponding duty to safeguard from disclosure to protect personal privacy); *Dusenberry v. N.J. City Univ.*, GRC Complaint No. 2009-101 (finding "outside activity" ethics forms to be personnel records exempt from disclosure under OPRA).

The Custodian additionally contends that the University has an obligation to safeguard a citizen's personal information when disclosure would violate a reasonable expectation of privacy, and that disclosure of documents relating to a pending disciplinary action would violate such an expectation. *See N.J.S.A. 47:1A-1; see also N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office*, 405 *N.J. Super.* 386 (App. Div. 2009).

The Custodian argues, in the alternative, that this complaint is analogous to *Rodriguez v. Kean University*, GRC Complaint No. 2013-100 (April 30, 2013), in which the GRC found in an Administrative Complaint Disposition that the Complainant had not actually asserted an unlawful denial of access because he had only challenged the necessity of the Custodian's request for an extension of time.

Analysis⁴

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. Under OPRA:

[T]he 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 . . .

N.J.S.A. 47:1A-10. When dealing with personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik, 206 N.J. at 594. These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel 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

[D]ata 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. 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 N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, the Appellate Division affirmed the trial court’s finding that documents relating to requests for outside employment are exempt personnel records as defined in OPRA. *See N. Jersey Media Grp., 405 N.J. Super. at 388; see also Dusenberry, GRC 2009-101*. The court determined that the documents could not be redacted in a manner sufficient to protect the privacy and personal interests of the individuals therein. *See id.* The court further concluded that the public interest in disclosing the information was outweighed by the individual public servants’ rights to protect their privacy and security. *See id.* at 388-89.

⁴ 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.

Additionally, after the plaintiff in N. Jersey Media Grp. filed a notice of appeal, the trial court submitted a memorandum noting that the question presented was whether the requested documents were properly labeled “personnel records.” *See id.* at 389. The court explained that while the requests for outside employment may not be personnel records by name, they bear many of the indicia of personnel files because, for example, “they pertain to the general subject matter of one’s employment, are proffered in furtherance thereof, and are made pursuant to the employee manual.” *See id.* The court concluded that, as such, “these documents are of the sort that are so similar to personnel files – if not actually personnel files – that they deserve protection as such.” *See id.*

The Appellate Division also agreed that the only personnel information a public entity is authorized to disclose are the specific items listed in N.J.S.A. 47:1A-10, and that such an entity 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 id.* at 390.

Here, the Complainant sought any correspondence from the University ELO to the SEC “seeking [a] concurrence of a proposed sanction on [a University employee] for ethics violation(s)” reported by the Complainant in 2010. The Custodian denied this request based on OPRA’s exemptions for ongoing investigations and personnel records. *See N.J.S.A.* 47:1A-3(a); N.J.S.A. 47:1A-10. The Custodian certified that she confirmed with the University ELO that an investigation was ongoing. The record is unclear as to whether this was so when the Custodian submitted her SOI for the present complaint on June 6, 2013, or if this confirmation occurred when she first denied the request (March 25, 2013) or submitted the SOI in response to the Complainant’s previous Complaint No. 2013-100 (April 22, 2013).

Regardless, the correspondence sought here are analogous to the outside employment materials the Appellate Division has confirmed to be OPRA exempt personnel records. *See N. Jersey Media Grp.*, 405 N.J. Super. at 388. The communications at issue may not be personnel records by name, but they bear many of the indicia of personnel files. *See id.* at 390. As a threshold matter, the requested correspondence do not fall within any of the delineated categories of personnel documents and information that can be disclosed pursuant to N.J.S.A. 47:1A-10. *See id.* at 390. The University, in turn, 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 N.J.S.A.* 47:1A-1; N. Jersey Media Grp., 405 N.J. Super. at 390.

For example, it is reasonable that a University employee, upon learning that he or she was the subject of a possible ethics investigation or sanction, would assume that related documents would be kept confidential. *See id.* at 389. The content of such documents pertains to employment, and under SEC regulations any preliminary investigation of an alleged ethics violation, the allegations therein, and the corresponding case file are considered confidential. *See N.J.A.C.* 19:61-3.1(a)(3); N.J.A.C. 19:61-3.1(c)(2)-(5); N. Jersey Media Grp., 405 N.J. Super. at 388. Similarly, as observed by the trial court in N. Jersey Media Grp., an employee charged with filing the communications related to a possible ethics sanction might not place such documents in an employee’s personnel file, “but would likely turn to an adjacent folder, in the same filing cabinet, and protect that file with the same lock and key that protects the personnel file itself.” *See N. Jersey Media Grp.*, 405 N.J. Super. at 389. The requested correspondence could not be

redacted in a sufficient matter to protect the privacy and personal interests of the individual about whose ethics sanction and investigation information is sought. *See N. Jersey Media Grp.*, 405 *N.J. Super.* at 388. Considering the above in conjunction with OPRA’s presumption against the disclosure of most personnel records, the public interest in allowing access to the requested information is outweighed by individual public servants’ rights to protect their privacy and security. *See Kovalcik*, 206 *N.J.* at 594; *N. Jersey Media Grp.*, 405 *N.J. Super.* at 388-89.

Therefore, the Custodian did not unlawfully deny access under OPRA to the requested communications regarding the potential ethics sanctioning of a University employee. *See N.J.S.A.* 47:1A-6. The Complainant requested the equivalent of “personnel records” exempted under *N.J.S.A.* 47:1A-10, and “[t]he same legislative intent embodied in the general exemption of personnel filed from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue” here. *See N. Jersey Media Grp.*, 405 *N.J. Super.* at 389; *see also Dusenberry*, GRC 2009-101.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access under OPRA to the requested communications regarding the potential ethics sanctioning of a University employee. *See N.J.S.A.* 47:1A-6. The Complainant requested the equivalent of “personnel records” exempted under *N.J.S.A.* 47:1A-10, and “[t]he same legislative intent embodied in the general exemption of personnel filed from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue” here. *See North Jersey Media Group, Inc.*, 405 *N.J. Super.* 386, 389 (App. Div. 200); *see also Dusenberry v. New Jersey City University*, GRC Complaint No. 2009-101 (April 28, 2010).

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

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

November 12, 2013