



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

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. 2013-157

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 lawfully denied access under OPRA to the requested memoranda regarding the disciplinary action taken by the Complainant against two (2) University employees. *See N.J.S.A. 47:1A-6*. The Complainant requested personnel records that are exempt from disclosure under OPRA, and he does not qualify as an “individual in interest” under *N.J.S.A. 47:1A-10*. *See Kovalcik v. Somerset County. Prosecutor’s Office*, 206 *N.J.* 581, 594 (2011); *North Jersey Media Group, Incorporated v. Bergen County. Prosecutor’s Office* 405 *N.J. Super.* 386, 389 (App. Div. 2009); *Hewitt v. Longport Police Department*, GRC Complaint No. 2004-148 (March 2005); *Mapp v. Borough of Roselle (Union)*, GRC Complaint No. 2009-334 (November 30, 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. 2013-157

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request No. 1: “In March or April 2013, [Employee No. 1] wrote a reply to a written warning given to her by [the Complainant] for leaving the Library early at the end of her shift. . . . I am asking for a copy of [Employee No. 1’s] reply . . .”

OPRA Request No. 2: “[Employee No. 2] wrote a reply to a counseling letter given by [the Complainant] to her sometime in September 2009 or 2010 for the manner in which she did not oversee the safety of materials in the Archives during construction in the Library. I am requesting a copy of the response memorandum [Employee No. 2] wrote to [the Complainant] . . .”

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: April 22, 2013
Response Made by Custodian: May 1, 2013
GRC Complaint Received: May 31, 2013

Background³

Request and Response:

On April 22, 2013, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On May 1, 2013, seven (7) business days after receipt of the requests, the Custodian responded in writing denying the Complainant’s requests based on OPRA’s exemption for personnel records. *See N.J.S.A. 47:1A-10.*

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.

Denial of Access Complaint:

On May 16, 2013, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserts that because the requested memoranda were addressed to him, he is a “person of interest” and therefore can receive the documents despite OPRA’s personnel records exemption. The Complainant states that he is seeking the memoranda because they “could protect me in case of a suit by one or both of my employees against me and it could help me in case I want to file a harassment complaint against one or both of these employees.” The Complainant contends that, due to this, his “private interests far outweigh the public’s interest.”

Statement of Information:

On June 12, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA requests on April 22, 2013 and denied access to the memoranda on May 1, 2013.

The Custodian states that the requests sought correspondence between the Complainant and two Kean University (“University”) employees regarding disciplinary action imposed by the Complainant in his capacity as the employees’ former supervisor. The Custodian notes that both requests directly acknowledge that the memoranda are associated with disciplinary action. The Custodian further states that the text of the Complainant’s requests confirm that the memoranda are, or should be, in departmental personnel files.

The Custodian contends that “[a]s both discipline documents are personnel records kept by the employer and may be used relative to the employees’ employment and/or disciplinary action, it was determined that the documents were exempt and not subject to production pursuant to N.J.S.A. 47:1A-10 . . .” The Custodian asserts that personnel files are presumed to be protected from disclosure unless they fall within three narrow exemptions. *Citing 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 further asserts that the requested memoranda were written in response to disciplinary actions and therefore do not fall within any of the statutory exceptions.

The Custodian also contends that “person in interest” exception contained in N.J.S.A. 47:1A-10 is misapplied by the Complainant: “[b]ecause the records pertain to [the] discipline of other employees, the records are within those employees’ personnel files, not the requestor’s personnel file. Thus, the requestor does not have authority to permit disclosure as a person in interest.” (quotations omitted).

The Custodian asserts that the public’s interest in confidentiality outweighs the Complainant’s private interest in disclosure, and that this principle is inherent in OPRA’s personnel records exemption. The Custodian states that, in the event of litigation, the Complainant could obtain the records through the discovery process or “rely on his admitted

knowledge” of them. The Custodian contends that the public disclosure of disciplinary records would unequally favor employers.

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. 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.

OPRA provides that:

[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.

The GRC has stated that:

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.

N.J.S.A. 47:1A-10 is a codified version of Executive Order 11 (1974) and [it] has been applied and understood that [the] only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An “individual in interest” is to mean the person who is the subject of the personnel file”

Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010).

The trial court in N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office submitted a memorandum, after the plaintiff filed a notice of appeal, examining what types of documents are properly labeled “personnel records.” *See* N. Jersey Media Grp., 405 N.J. Super. 386, 389 (App. Div. 2009). The court explained that while 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* N. Jersey Media Grp., 405 N.J. Super. at 389. 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 in N. Jersey Media Grp. 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 two memoranda sent to him by University employees after he had disciplined them. The Custodian denied these requests based on OPRA’s exemption for personnel records. *See* N.J.S.A. 47:1A-10. Regarding Request No. 1, the Denial of Access Complaint states that the University Librarian “sent an email . . . asking that the various memoranda related to this warning be put in [Employee No. 1’s] file in the University Librarian’s office.” Regarding Request No. 2, the Denial of Access Complaint states that “[t]he memorandum may not be in [Employee No. 2’s] file in the University Librarian’s office. It is most likely . . . in one of the folder (*sic*) in the credenza over the chair A copy . . . is on the hard drive” of the University Librarian’s computer.

The memoranda at issue, as correspondence, may not be personnel records by name, but they bear the indicia of personnel files and, as pointed out in the Denial of Access Complaint, are in fact likely part of the University employees’ personnel files. *See* N. Jersey Media Grp., 405 N.J. Super. at 390. Further, the requested memoranda 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. Specifically, while the Complainant may have been the original recipient of the requested memoranda, he is not the subject of either of the personnel files in which these memoranda were apparently directed. Rather, the two (2) University employees that the Complainant disciplined are the “individual[s] in interest” for the sake of OPRA’s exception to N.J.S.A. 47:1A-10. *See* Hewitt, GRC 2004-148; Mapp, GRC 2009-334.

Therefore, the Custodian lawfully denied access under OPRA to the requested memoranda regarding the disciplinary action taken by the Complainant against two (2) University employees. *See* N.J.S.A. 47:1A-6. The Complainant requested personnel records that are exempt from disclosure under OPRA, and he does not qualify as an “individual in interest” under N.J.S.A. 47:1A-10. *See* Kovalcik, 206 N.J. at 594; N. Jersey Media Grp. 405 N.J. Super. at 389; Hewitt, GRC 2004-148; Mapp, GRC 2009-334.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access under OPRA to the requested memoranda regarding the disciplinary action taken by the Complainant against two (2) University employees. *See* N.J.S.A. 47:1A-6. The Complainant requested personnel records that are exempt from disclosure under OPRA, and he does not qualify as an “individual in interest” under N.J.S.A. 47:1A-10. *See* Kovalcik v. Somerset County. Prosecutor’s Office, 206 N.J. 581, 594 (2011); North Jersey Media Group, Incorporated v. Bergen County. Prosecutor’s Office 405 N.J. Super. 386, 389 (App. Div. 2009); Hewitt v. Longport Police Department, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010).

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

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

November 12, 2013