



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
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. 2013-168

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 email directing the placement of an SEC report into a University employee’s personnel file. *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 files 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. North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office, 405 N.J. Super. 386, 389 (App. Div. 2009); *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 19<sup>th</sup> 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 Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-168**

v.

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

**Records Relevant to Complaint:** A copy of correspondence, with a “Show Original” copy if available, showing that Michael Tripodi forwarded a copy of the State Ethics Commission (“SEC”) report on a Kean University (“University”) employee to Human Resources (“HR”) and asked that the SEC report be placed in the employee’s HR file.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** April 26, 2013  
**Response Made by Custodian:** May 7 and May 21, 2013  
**GRC Complaint Received:** June 4, 2013

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

**Request and Response:**

On April 26, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 7, 2013, seven (7) business days after receipt of the request, the Custodian responded in writing seeking clarification of the Complainant’s request. On May 7, 2013, the Complainant provided the requested clarification. On May 21, 2013, ten (10) business days after receipt of the clarification, 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 June 4, 2013, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant states that he requested the above-referenced correspondence from the University’s

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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 McGrunther.

<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.

Ethics Liaison Officer (“ELO”) to HR, in which the ELO asked that the SEC report on an employee’s ethics issue be placed in that employee’s personnel file. The Complainant acknowledges that he received the SEC report when he was still University Librarian. The Complainant states that the University ELO’s email accompanying the report described the underlying case as “a pending disciplinary matter” of which “the details . . . remain confidential.” The Complainant contends that the investigation was closed when he made his request, citing to an email he received sometime before May 6, 2013 from the Executive Director of the SEC. The Complainant also asserts that the requested document is not a personnel record.

Statement of Information:

On November 5, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on April 26, 2013, and sought clarification on May 7, 2013. The Custodian further certifies that she denied access on May 21, 2013.

The Custodian states that, upon receipt of the Complainant’s amended OPRA request, she received confirmation from the University ELO/In-House Counsel that any responsive records would be considered part of the University’s open investigation into the matter and, additionally, exempt personnel records. *See* N.J.S.A. 47:1A-3(a); 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 further 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); Dusenberry v. N.J. City Univ., GRC Complaint No. 2009-101. Specifically, the Custodian states that the request for documents transmitting an SEC report to HR for placement in an employee’s personnel file does not fall within one of these limited exceptions.

The Custodian further contends that the University has an obligation to safeguard a citizen’s personal information when disclosure would violate a reasonable expectation of privacy. N.J.S.A. 47:1A-1. The Custodian asserts that the disclosure of “the mere existence of such a transmittal document” to the public would reveal information relating to a disciplinary action about which an employee has a reasonable expectation of privacy. The Custodian also asserts that the Complainant may be using confidential information he obtained in his capacity as a University employee as the basis for his request and, thus, is improperly disclosing such information in public documents. *Citing* N.J.S.A. 52:13D-25.

The Custodian additionally contends that the University had not made a final disciplinary determination at the time of the Complainant's request and, therefore, the matter continued to be pending even when the SEC's involvement ceased. See N.J.S.A. 47:1A-3(a).

### 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. Pursuant to 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. 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.

The trial court in N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 389 (App. Div. 2009) submitted a memorandum, after the plaintiff filed a notice of appeal, examining what types of documents are properly labeled "personnel records." Id. The court explained, for example, that while requests for outside employment 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." 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.; see also Dusenberry v. New Jersey City University, GRC Complaint No. 2009-101 (April 28, 2010).

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. Id. at 390.

Here, the Complainant sought a copy of correspondence in which the University's ELO forwarded an SEC report on a certain University employee's alleged ethics violations to HR and asked that the report be placed in the employee's personnel file. 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 correspondence at issue may not be a personnel record by name, but it bears the indicia of personnel files. See N. Jersey Media Grp., 405 N.J. Super. at 390. Further, the requested document does not fall within any of the delineated categories of information that can be disclosed pursuant to N.J.S.A. 47:1A-10. Id.

Specifically, 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 the requested email 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, such as this correspondence, 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." N. Jersey Media Grp., 405 N.J. Super. at 389.

The Complainant acknowledges here that he is not seeking the SEC report, as he already received a copy of it while previously employed as University Librarian, but the correspondence requested here still confirms to the public that the employee faced an ethics investigation and potential disciplinary action. Regardless of whether the requested document was part of an "ongoing investigation" under N.J.S.A. 47:1A-3, or if the Complainant, as a State employee, has improperly disclosed confidential information in his request under N.J.S.A. 52:13D-25, disclosure of the sought personnel record would violate the employee's reasonable expectation of privacy.

Therefore, the Custodian did not unlawfully deny access under OPRA to the requested email directing the placement of an SEC report into a University employee's personnel file. *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 files 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. *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 email directing the placement of an SEC report into a University employee's personnel file. *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 files 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. *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, 405 *N.J. Super.* 386, 389 (App. Div. 2009); *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