



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

June 24, 2014 Government Records Council Meeting

Luis F. Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2013-296

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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 notwithstanding the existence of reimbursement payments made pursuant to a possible ethics violation, such records are not disclosable under OPRA because disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). Thus, the Custodian lawfully denied access to the requested reimbursements, which may or may not exist within Dr. Hayat’s personnel file. N.J.S.A. 47:1A-6. Finally, because the requested records are exempt from disclosure as personnel records, the Council should decline to hold on the asserted privacy interest and grievance exemptions advanced by the Custodian in the Statement of Information.

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 24th Day of June, 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: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2013-296

v.

**Kean University (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of Dr. Eric Hayat's reimbursement to Kean University (in light of allegations that Dr. Hayat misused University property and was ordered to repay the University around \$20,000 in or before June 2011).

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: August 28, 2013
Response Made by Custodian: September 9, 2013
GRC Complaint Received: October 8, 2013

Background³

Request and Response:

On August 28, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 9, 2013, the Custodian responded in writing denying access to the requested records stating that same constituted personnel records exempt from disclosure under N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On October 8, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed that the responsive records constitute personnel records. The Complainant stated that in Milner v. Dep't of the Navy, 179 L. Ed. 2nd 268 (2011), the U.S. Supreme Court defined a personnel record as ". . . not that the file or department . . . is for personnel, but rather that the file or department . . . is about personnel – *i.e.*, that it relates to employee relations or human resources." The Complainant argued that, in North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 486 (App. Div.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

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.

2009), the New Jersey Superior Court, Appellate Division, provided the GRC guidance on determining whether records are personnel records: “[w]hile these documents may not be personnel records by name, they bear many of the indicia of personnel files. 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.* at 389. The Complainant contended that the requested records do not pertain to employee relations, human resources issues or Dr. Hayat’s employment. Further, the Complainant argued that the records were not provided by Dr. Hayat as a requirement for employment.

Statement of Information:

On November 1, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 28, 2013 and responded in writing on September 9, 2013.

The Custodian certified that the records responsive to the Complainant’s OPRA request are checks from Dr. Hayat to Kean University. The Custodian certified that on the advice of Counsel, she denied access to the responsive records under N.J.S.A. 47:1A-10.

The Custodian first contended that this complaint should be dismissed because the Complainant attached to his Denial of Access Complaint an OPRA request not relevant to this complaint. Thus, the Custodian argued that this complaint is defective because the Complainant failed to submit proper evidence that he submitted a request seeking reimbursements.⁴

The Custodian asserted that, alternatively, the GRC should find that she lawfully denied access to the responsive records because the reimbursement payments are personnel records. The Custodian stated that personnel records are exempt from access and that the New Jersey Supreme Court recognized that “OPRA, as it relates to personnel records, begins with a presumption of non-disclosure and proceeds with a few narrow exceptions . . .” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). Thus, the Custodian argued that disclosure of personnel records defaults at non-disclosure and must fit within one of three narrow categories in order to be disclosed. N.J.S.A. 47:1A-10. The Custodian further argued that OPRA’s plain language specifically exempts grievances from access. *Id.*

The Custodian asserted that no exception exists for records relating to an alleged ethics violation or disciplinary action. *See* NJMG, 405 N.J. Super. 386; Dusenberry v. New Jersey City Univ., GRC Complaint No. 2009-101 (April 2010). The Custodian contended that reimbursement checks made as the result of a disciplinary action against an employee would reveal personnel or disciplinary records otherwise not disclosable under OPRA.

⁴ The Complainant submitted as part of his complaint a copy of an OPRA request seeking “the report that Kean’s Ethics Liaison Officer would have sent to the [State Ethics Commission] . . .” However, his complaint identified Dr. Hayat’s reimbursement’s as at issue. Thereafter, the Custodian attached a copy of the relevant OPRA request to the SOI; thus, there is sufficient evidence to adjudicate this complaint on the basis that the Complainant submitted a valid OPRA request seeking the records at issue in this complaint.

Further, the Custodian argued that an employee has a reasonable expectation of privacy with respect to those actions. N.J.S.A. 47:1A-1. The Custodian asserted that employees have a reasonable expectation of privacy with respect to disciplinary actions taken against them. The Custodian argued that to acknowledge the existence of records responsive to the Complainant's request would be a violation of that privacy.

Additional Submissions:

On November 6, 2013, the Complainant requested that the GRC proceed with this complaint in accordance with the Denial of Access Complaint form, which provides that failure to submit all requested documentation could result in an adjudication delay and not denial. The Complainant noted that although he provided the wrong request to the GRC, the Custodian was able to reasonably respond with an SOI.

Next, the Complainant argued that an ethics violation is not akin to a "grievance" as defined in OPRA, which is ". . . in connection with collective negotiations . . ." N.J.S.A. 47:1A-1.1. The Complainant contended that OPRA's definition of a grievance coincides with Merriam-Webster's definition as well.⁵ The Complainant further reiterated from the Denial of Access Complaint that the responsive reimbursement checks are not personnel records because they do not pertain to Dr. Hayat's employment in general. The Complainant asserted that the University essentially argued in the SOI that checks generally are not personnel records unless they are part of an employee's personnel and disciplinary record. The Complainant requested that the GRC reject this argument and determine that the checks are not personnel records.

Finally, the Complainant argued that Dr. Hayat's expectation of privacy decreased the moment he violated Kean University's ethics code and possibly committed a crime. The Complainant asserted that an employee who violated ethics rules and/or criminal law should not expect that all records created in response to the resolution of the case be confidential.

Analysis

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. 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.

OPRA provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, 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

⁵ <http://www.merriam-webster.com/dictionary/grievance>.

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.

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.

Id.

The Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “. . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id.

Further, the Council addressed if personnel records which are not specifically identified in OPRA are subject to disclosure. Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). The complainant in Guerrero sought, among other records, “[a]ny known felony charges.” Id. In the SOI, the custodian argued that he was precluded from acknowledging the existence of felony charges because such information is not included within the excepted personnel information under OPRA. The Council agreed, determining that “. . . even if records of any felony charges were contained within Mr. Spinello’s personnel file, such records are not disclosable under OPRA . . .” Id. at 8. The Council reasoned that “OPRA clearly identifies certain [personnel] information that is subject to disclosure . . . These exceptions do not include any possible felony or criminal charges . . . Thus, OPRA implies that personnel records referencing felony charges are not subject to disclosure . . .” Id.

In the instant matter, the Complainant sought Dr. Hayat's reimbursement to Kean University of what was believed to be a 2011 ethics violation. The Complainant argued in his Denial of Access Complaint that disciplinary actions are not part of the personnel record because they do not pertain to employee relations, human resources issues or Dr. Hayat's employment. The Complainant further contended that the records were not provided by Dr. Hayat as a requirement for employment. In turn, the Custodian argued in the SOI that even acknowledging that Dr. Hayat was disciplined would be in contravention to OPRA's presumption that personnel records, with certain exceptions, are exempt from disclosure.

A condition of employment in government is adherence to policies, procedures and ethical standards of the agency. A failure to comply with the terms of this condition of employment may result in disciplinary actions being taken by the agency against the violating employee. Based on the Complainant's description in his OPRA request, the records sought appear to relate to a possible disciplinary action. Thus, if Dr. Hayat was disciplined for an ethics violation, it is reasonable that the documented discipline action would ". . . bear many of the indicia of personnel files." See NJMG, 405 N.J. Super. at 390. Further, as was the case in both Merino, and Guerrero, disclosure of the requested records or even acknowledgment of their very existence would violate OPRA's presumption that personnel records are exempt from disclosure. N.J.S.A. 47:1A-10.

Therefore, notwithstanding the existence of reimbursement payments made pursuant to a possible ethics violation, such records are not disclosable under OPRA because disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Merino, GRC 2003-110; Guerrero, GRC 2010-216. Thus, the Custodian lawfully denied access to the requested felony charges which may or may not exist within Dr. Hayat's personnel file. N.J.S.A. 47:1A-6. Finally, because the requested records are exempt from disclosure as personnel records, the Council should decline to hold on the asserted privacy interest and grievance exemptions advanced by the Custodian in the SOI.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that, notwithstanding the existence of reimbursement payments made pursuant to a possible ethics violation, such records are not disclosable under OPRA because disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). Thus, the Custodian lawfully denied access to the requested felony charges which may or may not exist within Dr. Hayat's personnel file. N.J.S.A. 47:1A-6. Finally, because the requested records are exempt from disclosure as personnel records, the Council should decline to hold on the asserted privacy interest and grievance exemptions advanced by the Custodian in the Statement of Information.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014