



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

October 28, 2014 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2014-121

At the October 28, 2014 public meeting, the Government Records Council (“Council”) considered the October 21, 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:

1. The Custodian appropriately responded to the portion of the OPRA request seeking the Kean Federation of Teachers e-mails attached to the Middle States Commission on Higher Education report because the Complainant acknowledged that he was in possession of the responsive records on May 16, 2014. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).
2. Because the portion of the Complainant’s request seeking “forwarding e-mails” failed to contain the proper criteria for requesting e-mails, this portion of the request is invalid under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 36-37 (App. Div. 2005); Elcavage v. Twp. of West Milford (Passaic), GRC Complaint No. 2009-07 *et seq.* (April 2010). *See also* Rodriguez v. Kean Univ., GRC Complaint No. 2013-68 (October 2013). Further, because this portion of the request is invalid, the Custodian has not unlawfully denied access to same. N.J.S.A. 47:1A-6.
3. Because the responsive e-mails contained all requisite information, and because same were not sent from or to a Gmail account, the Custodian lawfully denied access to the requested “Show Original” view of the e-mails. N.J.S.A. 47:1A-6.

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 28th Day of October, 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: October 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

Luis F. Rodriguez¹
Complainant

GRC Complaint No. 2014-121

v.

Kean University²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of reproduced e-mails between members of the Kean Federation of Teachers (“KFT”) attached as Exhibit A to Kean University’s (“Kean”) August 31, 2012 response to the Middle States Commission on Higher Education (“Commission”), including any and all forwarding e-mails related to same. Also, print-out of the “Show Original” related to all responsive e-mails.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: January 29, 2014
Response Made by Custodian: February 7, 2014
GRC Complaint Received: March 17, 2014

Background³

Request and Response:

On January 29, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 7, 2014, the Custodian responded in writing advising the Complainant that she would need until February 24, 2014 to appropriately respond to his OPRA request.

On February 24, 2014, the Custodian responded in writing stating that on January 24, 2014, the Complainant was provided with the August 31, 2012 response inclusive of the requested e-mails pursuant to a Government Records Council (“GRC”) Interim Order.⁴ The Custodian further stated that the portion of the request seeking any and all forwarding e-mails” is invalid and did not constitute identifiable records. Also, the Custodian stated that access to the “Show Original” print-outs was denied under N.J.S.A. 47:1A-1.1 (exempting disclosure of

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela L. Velez.

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.

⁴ See Rodriguez v. Kean Univ., GRC Complaint No. 2013-130 (February 2014).

administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security). Finally, the Custodian noted that OPRA does not require custodians to create records that do not exist, respond to requests for information or conduct research.

Denial of Access Complaint:

On March 17, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant contended that the Custodian unlawfully denied access to his OPRA request.

Regarding the Custodian's first denial, the Complainant contended that the e-mails provided to him on January 24, 2014, were not the original e-mails received by Kean. The Complainant asserted that if they were, the e-mails or memoranda forwarding same to Kean were not included in the Custodian's January 24, 2014 response. Specifically, the Complainant provided three (3) e-mails, one (1) of which included no sender and two (2) that identify either Ms. Audrey Kelly, Executive Director of the Board of Trustees, or Ms. Michelle Freestone in the print-out header that was not copied on the e-mails. The Complainant argued that these e-mails indicate that other documents that the Custodian failed to provide were not accompanied the e-mails. The Complainant asserted that it was these accompanying records he sought and the Custodian had no basis to deny those records.

Regarding the Custodian's second denial, the Complainant contended that the portion of his request seeking "any and all forwarding e-mails" accompanying the reproduced e-mails was not vague. The Complainant asserted that he clearly identified the first set of e-mails sought and that this portion of the request sought the e-mails forwarding same.

Regarding the Custodian's third denial, the Complainant stated that the Council recently ordered the Custodian to produce the "Show Original" portion of e-mails. Rodriguez v. Kean Univ., GRC Complaint No. 2013-141 (Interim Order dated November 19, 2013). Further, the Council allowed for certain redactions to the "Show Original" portion under N.J.S.A. 47:1A-1.1. Rodriguez, GRC 2013-141 (Final Decision dated January 28, 2014) at 3-4. The Complainant disputed the Custodian's denial of access, considering that she complied with the Council's Order in Rodriguez, GRC 2013-141 prior to responding to the OPRA request at issue here. The Complainant noted that the Council also conclusively ruled on the issue of whether providing the "Show Original" print-out was creating a record. Id. (Interim Order dated November 19, 2013) at 5.

Finally, the Complainant argued that although the Custodian was a party to Rodriguez, GRC 2013-141, she denied access to records on the same basis that the Council already determined to be improper. Further, the Complainant asserted that the records he received on January 24, 2014 were clearly not complete records. The Complainant also argued that the request, in its entirety identified specific government records. Additionally, the Complainant noted that the Custodian quoted from his OPRA request, as opposed to including the full original language of same. The Complainant alleged that, for these reasons, the Custodian's actions appear knowing and willful.

Statement of Information:

On May 9, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 29, 2014. The Custodian certified that she forwarded the request to Michael Tripodi, In-House Counsel, on January 29, 2014, who forwarded the request to Special Counsel on January 31, 2014. The Custodian certified that the request was forwarded to Ms. Kelly, on February 7, 2014. The Custodian certified that, on the same day, she extended the time frame to respond two (2) more weeks and subsequently responded on February 24, 2014.

The Custodian affirmed that the portion of the request seeking KTF e-mails attached to Kean’s response to the Commission is actually a duplicate request that was already addressed in Rodriguez, GRC 2013-141. The Custodian certified she provided the responsive e-mails to the Complainant on January 24, 2014 in response to the Council’s Interim Order. *See Rodriguez*, GRC 2013-141 (Final Decision dated January 28, 2014) at 3. Further, the Custodian affirmed that the Complainant acknowledged in the Denial of Access Complaint that he possessed these records. Also, the Custodian certified that the e-mails clearly indicate that Ms. Kelly and Ms. Freestone were recipients of same. The Custodian also noted that one of the e-mails superimposed into the Complainant’s Denial of Access Complaint only included the message contained in the e-mail and not any header information. The Custodian certified that the e-mail was part of a two (2) page chain. Moreover, the Custodian noted that the e-mail was between private, external e-mail addresses independent of Kean’s e-mail system.

Henceforth, the Custodian asserted that the only request items at issue seek “any and all forwarding e-mails” and the “Show Original” view for all responsive e-mails.

Regarding the forwarding e-mails, the Custodian contended that the request was overly broad because it failed to identify the sender/recipient, date or range of dates and subject or content. The Custodian argued that the number of responsive e-mails could be limitless. Further, the Custodian asserted that the Council previously determined that a request for correspondence related to a general topic was invalid. Rodriguez v. Kean Univ., GRC Complaint No. 2013-68 (October 2013)(citing MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 36-37 (App. Div. 2005)).

Regarding the “Show Original” view for all responsive e-mails, the Custodian stated that the view is a Google™ proprietary name for the metadata of an e-mail. The Custodian certified that the view provides information showing the electronic path of an e-mail, the IP addresses of involved computers and other information. The Custodian affirmed that in order to provide such a record, an Information Technology (“IT”) employee would have to create the record and review it for information the disclosure of which could threaten Kean’s computer security. Accordingly, the Custodian contended that the Complainant would not receive a different version of the e-mails; rather, he would receive a created record with metadata included. The Custodian asserted that OPRA does not require her to create such a record. MAG, 375 N.J. Super. at 546.

Further, the Custodian averred that since not all Kean e-mail system users utilize Gmail; thus, the “Show Original” feature is not necessarily available. Specifically, the Custodian certified that the e-mail users identified in the responsive records here do not use Gmail so there is no “Show Original” record. Also, the Custodian asserted that because the e-mails provided contains header information, there is no need for Kean to create a “Show Original” for each e-mail.

The Custodian further argued that the Council’s decision in Rodriguez, GRC 2013-141, is distinguishable from this complaint. The Custodian asserted that the Council reached its decision without the arguments advanced herein and believed that the “Show Original” view was a different record from the actual e-mail. Also, the Custodian noted that the e-mail at issue there was from a Gmail account and the e-mails did not contain header information. The Custodian argued that the difference here is that none of the e-mails originated from a Gmail account and all header information is included.

Additional Submissions:

On May 16, 2014, the Complainant conceded that, based on the wording of his request, the e-mails he received on January 24, 2014 are also responsive here. However, he still did not receive the “forwarding e-mails.” The Complainant reiterated from the Denial of Access Complaint that the e-mails provided implicate that the e-mails were forwarded to Ms. Kelly and Ms. Freestone. The Complainant asserted that his request sought these forwarding e-mails.

The Complainant contended that his request was not vague; rather, it referred clearly to the e-mails provided as part of Kean’s response to the Commission. Further, the Complainant asserted that one would reasonably think that the Custodian could have easily identified those e-mails in which Ms. Kelly or Ms. Freestone either forwarded the subject e-mails or received same via forward. The Complainant also contended that denying this portion of the request was not appropriate because the Custodian could have sought clarification.⁵

Analysis

Sufficiency of Response

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

⁵ The Complainant also requested that the GRC provide instruction on how a custodian should appropriately seek clarification. However, requesting clarification is not a requirement of denying access to an OPRA request that a custodian deems to be overly-broad. Rather, clarification is one method by which a custodian can lawfully respond to an OPRA request.

⁶ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

KTF E-mails

In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Id. at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id. (citations omitted).

The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. In the adjudication of the Denial of Access Complaint, the Council’s decision noted the certification of the custodian that copies of the requested record were available at the Housing Authority’s front desk upon simple verbal request by any member of the public. Moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006).

Here, the Custodian responded to this portion of the request advising that the Complainant received the KTF e-mails attached to the Commission report on January 24, 2014 as part of compliance in Rodriguez, GRC 2013-141, four (4) days prior to the submission of the OPRA request at issue here. The Complainant initially argued in his Denial of Access Complaint that he was seeking different e-mails than those provided on January 24, 2014. However, the Complainant later conceded on May 16, 2014 that those e-mails were responsive here based on the plain wording of his OPRA request. The GRC is satisfied that the Complainant’s admission is sufficient in conforming to the Court’s holding in Bart.

Accordingly, the Custodian appropriately responded to the portion of the OPRA request seeking the KTF e-mails attached to the Commission report because the Complainant acknowledged that he was in possession of the responsive records on May 16, 2014. Bart, 403 N.J. Super. at 617.

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.

Forwarding e-mails

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;⁷ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC has a long-standing precedent on the acceptable criteria that a requestor must include when seeking access to e-mails. In Elcavage v. Twp. of West Milford (Passaic), GRC Complaint No. 2009-07 *et seq.* (April 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that an OPRA request for e-mails must contain: “(1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.” Id. at 5 (emphasis omitted).

⁷ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Here, the portion of the request sought forwarding e-mails related to the KTF e-mails Kean attached to its response to the Commission. The Complainant argued in the Denial of Access Complaint that his request was not vague by virtue of identifying the KTF e-mails as those being forwarded. However, the GRC is not satisfied that simply identifying other e-mails is sufficient to meet the criteria set forth in Elcavage, GRC 2009-07. More specifically, forwarding e-mails that may refer to the KTF e-mails does not satisfy, at most, a time frame within which responsive e-mails would fall. Further, as noted by the Custodian in the SOI, this portion of the request is more closely related to the request in Rodriguez, GRC 2013-68 seeking “any and all . . . correspondence memorializing” a conversation between two (2) individuals that took place on a certain date. There, the GRC noted that the request was invalid on its face.

Accordingly, because the portion of the Complainant’s request seeking “forwarding e-mails” failed to contain the proper criteria for requesting e-mails, this portion of the request is invalid under OPRA. MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; Elcavage, GRC 2009-07. *See also* Rodriguez, GRC 2013-68. Further, because this portion of the request is invalid, the Custodian has not unlawfully denied access to same. N.J.S.A. 47:1A-6.

The GRC notes that it is not addressing how or when Ms. Kelly or Ms. Freestone received the KTF e-mails, simply that the Complainant’s request for “forwarding e-mails” does not meet the criteria set forth in Elcavage.

“Show Original” Views

In Rodriguez, GRC 141 (Interim Order dated November 19, 2013), the complainant stated in the Denial of Access Complaint that he sought the “Show Original” view for a responsive e-mail because it “did not provide” header information (sender, recipients, date and time). The custodian argued in the SOI that she was not required to create a record.

The Council determined that the custodian unlawfully denied access to e-mails in the “Show Original” view and required disclosure of same. The Council reasoned that “[t]he Complainant has made a valid OPRA request and asked that the record be produced in a particular format within the digital medium used by the University.” Id. at 5. Following the Custodian’s compliance, the Council determined that the custodian lawfully redacted certain information in the “Show Original” view that consisted of “administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security.” Rodriguez, GRC 2013-141 (Final Decision dated January 28, 2014) at 4.

Here, the Complainant similarly sought the “Show Original” view for all responsive KTF e-mails. In the Denial of Access Complaint, the Complainant disputed the Custodian’s denial of access because of the Council’s decision in Rodriguez. In the SOI, the Custodian attempted to distinguish this complaint from Rodriguez, arguing that unlike the e-mails there, these e-mails did not utilize a Gmail account and contained all header information. Further, the Custodian argued that providing a record in the “Show Original” view is creating a new e-mail and simply not converting that e-mail to a different view.

A review of the responsive e-mails here supports the Custodian's SOI arguments. The chain e-mails do not include Gmail addresses by which the Custodian could produce the "Show Original" view through Google.⁸ Further, the e-mails contain all requisite header information, which is distinguishable from the e-mail in Rodriguez.

Thus, the GRC is satisfied that, notwithstanding that the Custodian would not likely be able to produce "Show Original" views of the responsive e-mails, producing such would be an unnecessary duplication of disclosure. Further, the GRC agrees that the facts here are distinguishable from Rodriguez, GRC 2013-141. Although the GRC disagrees that producing an e-mail in the "Show Original" view would be creating a new record, the responsive e-mails contain detailed header information of which the GRC has routinely required disclose. Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Additionally, the header information corroborated the Custodian's certification that no Gmail accounts were involved in the transmission of the e-mails. Moreover, any additional information that may have been yielded from the "Show Original" view would likely have been exempt as "administrative or technical information."

Therefore, because the responsive e-mails contained all requisite information, and because same were not sent from or to a Gmail account, the Custodian lawfully denied access to the requested "Show Original" view of the e-mails. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian appropriately responded to the portion of the OPRA request seeking the Kean Federation of Teachers e-mails attached to the Middle States Commission on Higher Education report because the Complainant acknowledged that he was in possession of the responsive records on May 16, 2014. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).
2. Because the portion of the Complainant's request seeking "forwarding e-mails" failed to contain the proper criteria for requesting e-mails, this portion of the request is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 36-37 (App. Div. 2005); Elcavage v. Twp. of West Milford (Passaic), GRC Complaint No. 2009-07 *et seq.* (April 2010). *See also* Rodriguez v. Kean Univ., GRC Complaint No. 2013-68 (October 2013). Further, because this portion of the request is invalid, the Custodian has not unlawfully denied access to same. N.J.S.A. 47:1A-6.

⁸ The GRC notes that although the "Show Original" view is a proprietary function of Google™, other webmail providers and e-mail clients allow their users to access similar information in a variety of ways. <https://support.google.com/mail/answer/22454?hl=en> (accessed October 17, 2014).

3. Because the responsive e-mails contained all requisite information, and because same were not sent from or to a Gmail account, the Custodian lawfully denied access to the requested “Show Original” view of the e-mails. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

October 21, 2014