



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**

**November 18, 2014 Government Records Council Meeting**

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

Complaint No. 2014-52

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the November 10, 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 final reports stemming from whistleblower complaints are not subject to disclosure under OPRA because such reports are not specifically identified as personnel information subject to disclosure under OPRA. N.J.S.A. 47:1A-10; North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6. Finally, because the requested record is 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.

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 18<sup>th</sup> Day of November, 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: November 20, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 18, 2014 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-52**

v.

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

**Records Relevant to Complaint:** Hard copies of:

“According to Maria Rizzolo, the Internal Auditor’s Office recently completed its investigation of a whistleblower complaint I filed with her office. I request a copy of any and all final reports related to that investigation. Redacting the document(s) is OK with me.”

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** December 6, 2013  
**Response Made by Custodian:** January 6, 2014  
**GRC Complaint Received:** January 27, 2014

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

**Request and Response:**

On December 6, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 17, 2014, the Custodian sought an extension of time to respond, in writing, to until January 6, 2014. On January 6, 2014, the Custodian responded, in writing, denying the request as exempt from disclosure under N.J.S.A. 47:1A-10 (personnel and pension records), Executive Order No. 21 (Gov. McGreevey 2002) (“EO 21”), and Executive Order No. 26 (Gov. McGreevey 2002) (“EO 26”).

**Denial of Access Complaint:**

On January 27 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s reasons

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Angela Velez, DAG.

<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.

for denial were erroneous. He argued that according to the GRC's "Handbook for Custodians," a custodian should disclose a record "when authorized by an individual in interest." The Complainant contended that since he was an individual of interest regarding the whistleblower complaint, the Custodian should grant him access to final reports stemming from the complaint.

The Complainant also contended that EO 26 pertains to complaint records of discrimination, harassment, and hostile environments. However, because the record sought is a whistleblower complaint, the Complainant asserted that EO 26 is inapplicable. The Complainant added that records identified under EO 26 are handled by a different office ("Affirmative Action Office") at Kean University ("Kean") than whistleblower complaints ("Internal Audit Office").

Lastly, the Complainant argued that the grounds for denying access, along with the length of time taken to adjudicate his whistleblower complaint, are evidence of a knowing and willful violation under OPRA.

#### Statement of Information:

On March 3, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the responsive record contains issues pertaining to an employee grievance complaint filed by the Complainant, as well as a hostile work environment complaint. The Custodian argued that because completion of the whistleblower complaint necessitated an investigation into the Complainant's hostile work environment complaint, the entirety of the record is exempt from disclosure under N.J.S.A. 47:1A-10 and EO 21.

The Custodian also certified that the whistleblower report contains information concerning state ethics violations. Therefore, the Custodian contended that such information is also exempt from disclosure under N.J.A.C. 19:61-1.1 et seq.

Moreover, the Custodian argued that denial of access is warranted on public policy grounds. The Custodian cited Kean University's ("Kean") Whistleblower Policy, which allegedly states that a "confidential" investigation would be conducted by designated Kean personnel. The Custodian asserted that the confidentiality provision is critical to maintaining an open investigation process and prevent a "chilling" effect on future whistleblower complaint filings.

### 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 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 of personnel records 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. Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). The Complainant, in Rodriguez, GRC No. 2013-296, sought an employee’s reimbursement to Kean University of what was believed to be a 2011 ethics violation. Therein the Complainant argued that disciplinary actions are not part of the personnel record because they do not pertain to employee relations, human resources issues or the employee’s employment. In turn, the Custodian argued that acknowledging that the employee was

disciplined would be in contravention to OPRA's presumption that personnel records, with certain exceptions, are exempt from disclosure. The Council reasoned that "[b]ased on the Complainant's description in his OPRA request, the records sought appear to relate to a possible disciplinary action. Thus, if [the employee] was disciplined for an ethics violation, it is reasonable that the documented discipline action would ". . . bear many of the indicia of personnel files.'" Id., citing North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009). The Council therefore held that "disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA." Rodriguez, GRC No. 2013-296.

In the instant matter, the Complainant sought the final investigatory report stemming from a whistleblower complaint he filed on September 13, 2012. Whistleblower complaints submitted to Kean are governed by its "Kean University Whistleblower Policy," which was established pursuant to New Jersey's Conscientious Employee Protection Act ("CEPA") (N.J.S.A. 34:19-1, et seq.). By definition, a "whistleblower" is someone who calls attention to misconduct committed by his employer or fellow employees.<sup>4</sup> In turn, a whistleblower complaint is a claim by an employee that adverse action was taken against him as a result of revealing misconduct by others. Thus, by its very nature a whistleblower complaint "bears . . . the indicia of personnel files" because it is a claim of misconduct in retaliation for revealing misconduct. NJMG, 405 N.J. Super. at 390. *See also* Merino, GRC No. 2003-110.

A review of the investigatory report reveals that the Complainant's whistleblower complaint and resulting investigation invariably involved issues of disciplinary actions imposed by or upon the Complainant.<sup>5</sup> In this instance, the Complainant claimed that disciplinary action taken against him was in retaliation for calling attention to alleged hostile and/or ethical misconduct by certain employees. Similar to Rodriguez, GRC No. 2013-296, the requested report "appear[s] to relate to a possible disciplinary action," and disclosure of such would violate the principle behind OPRA personnel records exemption. N.J.S.A. 47:1A-10.

Therefore, final reports stemming from whistleblower complaints are not subject to disclosure under OPRA because such reports are not specifically identified as personnel information subject to disclosure under OPRA. N.J.S.A. 47:1A-10; NJMG, 405 N.J. Super. at 390, Merino, GRC No. 2003-110; Rodriguez, GRC No. 2013-296. Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6. Finally, because the requested record is 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 final reports stemming from whistleblower complaints are not subject to disclosure under OPRA because

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<sup>4</sup> "whistleblower." The American Heritage® Dictionary of the English Language, Fourth Edition. 2003. Houghton Mifflin Company 29 Oct. 2014 <http://www.thefreedictionary.com/whistleblower>.

<sup>5</sup> The GRC takes judicial notice that the Custodian provided the requested record as part of an *in camera* order in a separate matter.

such reports are not specifically identified as personnel information subject to disclosure under OPRA. N.J.S.A. 47:1A-10; North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6. Finally, because the requested record is 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 SOL.

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

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

November 10, 2014